Petition

81-1944

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PACIFIC LEGAL FOUNDATION, *et al.*,
Petitioners,

v.

STATE ENERGY RESOURCES CONSERVATION &
DEVELOPMENT COMMISSION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RONALD A. ZUMBRUN
ROBIN L. RIVETT
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154

RAYMOND M. MOMBOISSE
SAM KAZMAN
Pacific Legal Foundation
1990 M Street, N.W., Suite 550
Washington, D.C. 20036
Telephone: (202) 466-2686

Attorneys for Petitioners

QUESTIONS PRESENTED FOR REVIEW

1. Whether federal regulation of nuclear energy and federal policy to encourage its development and use, under the Atomic Energy Act, 42 U.S.C. §§ 2011-2281, preempt California's prohibition on the construction of new nuclear power plants.

2. Whether an individual whose job at a proposed nuclear power plant was destroyed by California's nuclear moratorium has standing to challenge the validity of that law.

PARTIES BELOW

The parties in the action below were the following:

1. *plaintiffs-appellees*—Pacific Legal Foundation, a nonprofit California corporation;* the San Diego Coalition, a nonprofit California corporation; the San Diego Section of the American Nuclear Society, a New York corporation; the San Diego County Building and Construction Trades Council, a labor organization; and Robert C. Thornberry, an individual;

2. *defendants-appellants*—the California State Energy Resources Conservation and Development Commission, a state agency; and Emilio E. Varanini, III, C. Suzanne Reed, Ronald D. Doctor, Russell L. Schweickart, and James L. Walker, in their capacities as members of the Commission;

3. *defendants-intervenors*—the Natural Resources Defense Council, Inc., the Environmental Defense Fund, Inc., the Sierra Club, and Californians for Nuclear Safeguards.

In the Court of Appeals for the Ninth Circuit, this action was consolidated with the case of *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission.* The plaintiffs-appellees in that action were Pacific Gas and Electric Company and Southern California Edison Company, and they have filed a separate petition for certiorari with this Court. The defendant and defendant-intervenor parties in that action were the same as those in the instant case.

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* Pacific Legal Foundation has no parent companies or subsidiaries. It is affiliated with the College of Public Interest Law, a fellowship program for law school graduates.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners Pacific Legal Foundation (PLF), the San Diego Coalition, the San Diego Section of the American Nuclear Society, the San Diego County Building and Construction Trades Council, and Robert C. Thornberry respectfully request that this Court issue a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals in this case, and in the consolidated action brought by the Pacific Gas and Electric Company (the *PG&E* case), is officially reported as *Pacific Legal Foundation v. State Energy Resources Conservation &*

Development Commission, 659 F.2d 903 (9th Cir. 1981). The Ninth Circuit's opinion is reprinted in the appendix to the petition for certiorari which has been separately filed by PG&E (PG&E App.). The PG&E appendix is incorporated by reference into this petition.

The opinion of the District Court in the *PLF* case is officially reported at 472 F. Supp. 191 (S.D. Cal. 1979) and is reprinted in the appendix to this petition. PLF App. 1. The District Court opinion in the related *PG&E* case is officially reported at 489 F. Supp. 699 (E.D. Cal. 1980) and is reprinted in the PG&E Appendix.

JURISDICTION

The opinion of the Court of Appeals was issued on October 7, 1981. No separate judgment was issued. A timely motion for rehearing was denied on January 20, 1982. PLF App. 19. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the question of whether federal law and policy on nuclear energy preempt California's across-the-board prohibition on the construction of new nuclear plants. California's nuclear moratorium is contained in Section 25524.2 of the California Public Resources Code. The federal law against which that moratorium must be judged is the Atomic Energy Act, 42 U.S.C. §§ 2011-2282. These laws are set forth in the PG&E Appendix and are hereby incorporated by reference.

The governing provision of the United States Constitution on the issue of preemption is the supremacy clause:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme

> Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2.

Also at issue in this case is the question of whether a nuclear engineer whose job was destroyed by the moratorium has standing, on that basis, to challenge its validity. The governing provision of the Constitution regarding this question is the "case and controversy" clause of article III:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority . . . ." Art. III, § 2.

STATEMENT OF THE CASE

A. Introduction

In the Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919, Congress determined to allow private industry to participate in the field of nuclear energy as a means of encouraging the development and utilization of that energy source for peaceful purposes. In 1976, California enacted a moratorium on the construction of new nuclear plants in the state. This moratorium was one of three amendments which were added to the state's Public Resources Code and which are known collectively as the California Nuclear Laws. The Nuclear Laws impose a number of preconditions to the construction of any new nuclear plants within California. New Section 25524.1 prohibits the construction of any new nuclear plant which requires fuel rod reprocessing until it is found that there is a federally approved technology for reprocessing or storing spent fuel rods. Section 25524.2, the nuclear moratorium provision, prohibits the construction of new plants absent a finding that the federal government has approved a method for disposing of high-level nuclear wastes. Finally, Section 25524.3 forbids the construction of new plants until the com-

pletion of a feasibility study on placing such plants either underground or surrounded by earthen berms. PG&E App. 207-17.

The California Nuclear Laws are implemented by the State Energy Resources Conservation and Development Commission (State Energy Commisssion), which was established in 1974 by the Warren-Alquist State Energy Resources Conservation and Development Act, Cal. Pub. Res. Code §§ 25000, *et seq.* PG&E App. 193. It is the responsibility of the State Energy Commission to make the findings required by the California Nuclear Laws. These findings can be disapproved by the California Legislature, but otherwise they are a prerequisite to the certification of any new nuclear plant within the state. No power generating facility can be constructed in California without such certification. Cal. Pub. Res. Code § 25500, PG&E App. 194-95.

The California Nuclear Laws were considered and enacted during the pendency of the public referendum measure known as the California Nuclear Safeguards Initiative, or Proposition 15 (reprinted at PLF App. 22). *PLF v. State Energy Commission,* 659 F.2d at 924, PG&E App. 37. Proposition 15 proposed a number of prerequisites for the certification of new nuclear plants and for the continued operation of existing nuclear plants. It would have required the removal of the limits imposed by the federal government on the liability of plant operators for nuclear accidents under the Price-Anderson Act, 42 U.S.C. § 2210. It also would have required numerous safety assurances regarding nuclear plant operation. In the words of the State Energy Commission, Proposition 15 "would have simply shut down all existing nuclear power plants and flatly prohibited the construction of new ones." State Energy Commission, Appellate Brief at 9; *see also* 659 F.2d at 924, PG&E App. 37-39.

The California Nuclear Laws were enacted on June 3, 1976. Five days later, Proposition 15 was rejected by the voters of California by a 2-1 margin. PLF, Appellate Brief at 5.

On January 25, 1978, the State Energy Commission issued its finding that there was no federally approved technology for the disposal of high-level nuclear wastes. *PLF v. State Energy*

Commission, 472 F. Supp. at 194. The Commission therefore could not make the affirmative finding on waste disposal required by the California Nuclear Laws.

Two days later, on January 27, 1978, the Board of Directors of the San Diego Gas and Electric Company resolved that it would attempt to obtain an exemption from the California Nuclear Laws for a proposed plant known as the Sundesert Nuclear Project. Excerpt of Record (ER) at 437-38, *PLF v. State Energy Commission* (9th Cir.).

On May 3, 1978, the Board of Directors gave up its attempt. Having failed to obtain an exemption for the Sundesert project, it decided to "[i]mmediately stop any further Sundesert expenditures" and "[p]romptly terminate all Sundesert contracts . . . ." ER at 440.

Robert C. Thornberry is a nuclear engineer who was employed by San Diego Gas and Electric on the Sundesert project. On May 31, 1978, four weeks after the Board of Directors decided to terminate Sundesert, Robert Thornberry lost his job due to a reduction in force at the project. ER at 376, 442; 659 F.2d at 909-10.

B. History of the Proceedings Below

The PLF action challenging the California Nuclear Laws was filed four months after Robert Thornberry lost his job. The action was brought in federal district court on behalf of Mr. Thornberry and four organizations. The basis for federal jurisdiction was 28 U.S.C. §§ 1331(a) (federal question) and 1337 (regulation of commerce).

The District Court entered its judgment on March 6, 1979, after hearing motions for summary judgment and dismissal. The court ruled that only Robert Thornberry had standing to challenge the California Nuclear Laws, and that only Section 25524.2, the moratorium provision, was ripe for review. That provision was found unconstitutional on the ground of federal preemption. The court ruled that it invaded the area of radiation hazard control, which Congress had foreclosed to state legislation, and that it frustrated the congressional objective of encouraging nuclear energy development by prohibiting

new nuclear plants. The court refused to accept the State Energy Commission's claim that, because the Nuclear Laws were allegedly enacted for economic purposes and not for reasons of safety, they were therefore valid. 472 F. Supp. at 198, PLF App. 12.

Thirteen months after the judgment in the *PLF* case, another district court issued a similar, though broader, ruling in a separate action brought by PG&E. That court found that all three of the California Nuclear Laws were federally preempted, as well as several other provisions of the California Public Resources Code.

The *PLF* and *PG&E* cases were consolidated on appeal before the Ninth Circuit. On October 7, 1981, a panel of that court ruled that only two provisions of the Public Resources Code were ripe for review—the nuclear moratorium, and another section requiring that all power plant proposals contain at least three alternate sites. The court held both provisions to be valid, accepting the State Energy Commission's claim that the moratorium was "directed toward purposes other than protection against radiation hazards." 659 F.2d at 925, PG&E App. 40. The court also found that there was no frustration of federal policy by the state laws, despite their effect of blocking the construction of any new nuclear plants.

On the question of standing, the court ruled that, even if Thornberry had lost his job as a result of the nuclear moratorium, this "would not suffice to give Thornberry standing"—he would still have to prove that he would get his job back were the moratorium to be invalidated. 659 F.2d at 913, PG&E App. 14. The court reversed the judgments in both cases, and remanded the *PLF* case for further proceedings. On January 20, 1982, timely petitions for rehearing in both cases were denied, leading to the petitions for certiorari which have been separately filed in both this and the *PG&E* case.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals effectively rewrites the law of preemption on the issue of state enactments which

conflict with federal policy. Despite the fact that Congress has determined to encourage the development and use of nuclear energy as a matter of national policy, the court's ruling opens the door for any state to block categorically the development of this energy source. Such a result would be of national consequence at any time; because of the energy shortages of the past decade, the present importance of this issue cannot be overstated. The decision itself conflicts with legal principles established by this Court regarding the preemptive scope of the Atomic Energy Act and the manner in which federal-state conflicts are to be analyzed and resolved. For these reasons, this petition for certiorari should be granted.

I

THE NINTH CIRCUIT'S DECISION UPHOLDING CALIFORNIA'S NUCLEAR MORATORIUM CONFLICTS WITH THE RULINGS OF THIS COURT AND OF OTHER CIRCUIT COURTS ON FEDERAL PREEMPTION OF NUCLEAR ENERGY REGULATION AND ALLOWS THE OBSTRUCTION OF FEDERAL POLICY TO PROMOTE THE DEVELOPMENT AND USE OF NUCLEAR POWER

The Atomic Energy Act states, as congressional policy, that the "development, utilization, and control of atomic energy for military and for all other purposes are vital to the common defense and security." 42 U.S.C. § 2012(a). It declares that one of its purposes is

> "to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public . . . ." *Id.* at § 2013(d).

It expressly reserves the regulation of nuclear plant construction and operation to the federal government, and it explicitly prohibits state regulation of such plants with respect to radiation hazards. Under 42 U.S.C. § 2021(c)(1), the "construction and operation of any [nuclear] production or utilization facility" is and must remain the responsibility of the

Nuclear Regulatory Commission (NRC) (formerly the Atomic Energy Commission (AEC); *see* 659 F.2d at 920 n.25, PG&E App. 29 n.25). Unlike other subject areas, for which responsibility may be transferred to states pursuant to 42 U.S.C. § 2021(b), this is an area for which federal responsibility cannot be delegated. Similarly, while 42 U.S.C. § 2021(k) preserves state regulatory authority, it does so only for those regulations which are "for purposes *other than* protection against radiation hazards." (Emphasis added.)

The preemptive scope of these provisions was extensively analyzed in *Northern States Power Co. v. Minnesota,* 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.,* 405 U.S. 1035 (1972).[1] The court there found that the legislative history

> "makes it clear that Congress intended to pre-empt the field of the licensing and regulation of nuclear reactors to the exclusion of the states and that it did not intend to provide for dual regulation of radiation hazards, even as to those activities which could be turned over to the states." 447 F.2d at 1151.

The court concluded that "the federal government has exclusive authority under the doctrine of pre-emption to regulate the construction and operation of nuclear power plants . . . ." *Id.* at 1154.

The *Northern States* holding has since been applied by a number of courts. In *Train v. Colorado Public Interest Research Group, Inc.,* this Court noted that

> "state regulatory programs must be compatible with the AEC's regulatory program, § 2021(d)(2), and States are precluded from playing any role in several significant areas of regulation . . . ." 426 U.S. 1, 16 n.12 (1976), *citing Northern States.*

In *Silkwood v. Kerr-McGee Corp.,* the Tenth Circuit stated that

> "[w]e cannot read [*Northern States*] and *Train* other than as requiring us to hold invalid any state

[1] The summary affirmance of *Northern States* by this Court was a decision on the merits and is binding on lower federal courts. *Hicks v. Miranda,* 422 U.S. 332, 344-45 (1975).

> action that competes substantially with the AEC (NRC) in its regulation of radiation hazards associated with plants handling nuclear material." No. 79-1894 (10th Cir. Dec. 11, 1981), slip op. at 29 (reversing an award of punitive damages against a nuclear plant).

Several district courts have similarly invalidated state and local laws on the basis of *Northern States.* Restrictions on the importation of out-of-state nuclear waste were stricken in *General Electric Co. v. Fahner,* Nos. 80-C-6835, 81-C-461 (N.D. Ill. Oct. 12, 1981), *appeal docketed sub nom. Illinois v. General Electric Co.,* Nos. 81-2768, 81-2778 (7th Cir. Nov. 6, 1981), and *Washington State Building & Construction Trades Council v. Spellman,* 518 F. Supp. 928 (E. D. Wash. 1981), *appeal docketed,* No. 81-3453 (9th Cir. July 27, 1981). In *United States v. City of New York,* 463 F. Supp. 604 (S.D.N.Y. 1978), a municipal requirement of health and safety certificates for nuclear facilities was likewise invalidated.

The Ninth Circuit stated that it was following the *Northern States* decision in upholding California's nuclear moratorium. According to the court, this across-the-board prohibition of new nuclear plants is not a regulation aimed at safety hazards, does not intrude upon an area of federal control, and does not frustrate congressional policy with respect to nuclear energy. Each of these conclusions is inaccurate and obscures the actual impact of the moratorium. More importantly, the court arrived at these conclusions in a manner contrary to the approach which this Court has set forth for analyzing preemption issues.

A. The Ninth Circuit Ignored the Supreme Court's Explicit Ruling on the Inconclusiveness of Legislative Committee Reports When It Ruled that California's Nuclear Moratorium Is Not Aimed at the Prohibited Area of Safety Regulation

The Ninth Circuit upheld California's nuclear moratorium on the ground that its purpose is not safety but economics. This holding is contradicted by the very history of the moratorium. Furthermore, the court reached it by giving conclusive weight to the report of a state legislative committee—an approach

which this Court expressly rejected as "aberrational" in *Perez v. Cambell*, 402 U.S. 637, 651 (1971).

As explained at page 4, *supra*, the California Nuclear Laws were considered and enacted while Proposition 15 was before the voters of California. The relationship between the two has never been questioned. The California Assembly Committee on Resources, Land Use, and Energy, which drafted the laws, stated that this legislation was "designed to achieve in part and to supplement the goals of the Initiative [Proposition 15]." ER at 212. Because of the similar purposes of Proposition 15 and the Nuclear Laws, the state legislature provided that the laws "shall not become operative if Proposition 15 . . . is adopted." Historical Note to Section 25524.2, PLF App. 21. The State Energy Commission even claimed that the Nuclear Laws were responsible for the defeat of Proposition 15 by making it unnecessary:

> "Forestalling voter approval of a ballot initiative that would have simply shut down all existing nuclear power plants and flatly prohibited the construction of new ones, the legislature therefore enacted three laws, including the nuclear waste-disposal law . . . . " State Energy Commission, Appellate Brief at 9-10 (footnote omitted).

The Ninth Circuit accordingly characterized the Nuclear Laws as "an alternative to . . . Proposition 15." 659 F.2d at 924, PG&E App. 37. Yet it proceeded to construct a dichotomy between their purposes. According to the court, there were "a number of perceived problems with nuclear power, some safety-related and some economic." *Id.*, PG&E App. 38. The economic issues were allegedly "stipulated" by industry and government, while the safety issues were disputed. *Id.* Despite the court's recognition of these problems, the court found that the initiative and the Nuclear Laws did not deal with them in similar fashions. According to the court, "Proposition 15 was designed to deal with both types of problems associated with nuclear waste disposal." *Id.*, PG&E App. 39. On the other hand, the nuclear moratorium

> "was intended to deal only with the 'stipulated' problem caused by the lack of any approved method

> of waste disposal. The [state legislative] committee explained that its bills were 'designed to provide a pause in the deployment of nuclear power plants until [certain] problems which may 'clog' the nuclear fuel cycle are resolved.' . . . One of the 'major distinguishing features' differentiating Proposition 15 and the committee bills was that '[w]aste disposal *safety* is not directly addressed by the bills, which ask only that a method be chosen and accepted by the federal government.' " 659 F.2d at 925, PG&E App. 39-40 (emphasis in original, citations omitted).

As this passage indicates, the court had one and only one basis for its conclusion—the report of the California Assembly Committee on Resources, Land Use, and Energy.[2] The Supreme Court has made it clear that, in analyzing a preemption problem, such a legislative document must be viewed critically; otherwise, it would be all too easy for a state committee to save an invalid law by means of a carefully worded report:

> "We can no longer adhere to the aberrational doctrine . . . that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. Apart from the fact that it is at odds with the approach taken in nearly all our Supremacy Clause cases, *such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective*—that would be tangentially furthered by the proposed state law. . . . [A]ny state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause." *Perez v. Campbell*, 402 U.S. at 651-52 (emphasis added).

The District Court followed this approach, rejecting the premise

> "that any sort of regulation at all is permissible as long as a state legislature is willing and ingenious

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[2] The court cites this document nearly a dozen times in the course of discussing the legislative purpose of the Nuclear Laws, and relies on it exclusively in this regard. *See* 659 F.2d at 924-25, PG&E App. 37-40.

> enough to conjure up a legislative purpose other than radiation control." 472 F. Supp. at 198, PLF App. 12.

Yet *Perez* goes totally unmentioned in the Ninth Circuit's opinion. There is not even a suggestion in the appellate decision that it might be appropriate to give this committee report less than conclusive weight, despite the clear likelihood that the authors of that report were aware of the potential conflict with federal law.[3]

The Ninth Circuit admitted that Proposition 15 was at least in part a safety measure. 659 F.2d at 924, PG&E App. 37-38. It admitted that the Nuclear Laws were "enacted as an alternative" to that measure. *Id.*, PG&E App. 37. Yet it nonetheless proceeded to find that the Nuclear Laws were not safety related, on the basis of an elaborate construct of "stipulated" and non-stipulated issues set forth in the report of a state assembly committee. This approach is contrary to common sense, and it was explicitly rejected by this Court in *Perez*. As in the case of the Emperor's New Clothes, the committee's attempt to bedeck a statute with secondary purposes should not succeed in hiding what is underneath.

B. Under Principles Set Forth by the Supreme Court, the Federal Government's Decisions Concerning Nuclear Waste Disposal Preempt Any Contrary Decision by California

Unlike California, the federal government has, through the NRC, proceeded with the development of nuclear energy despite the fact that no method for the permanent disposal of nuclear wastes has yet been decided upon. As the Second Circuit stated in *Natural Resources Defense Council, Inc. v. NRC*,

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[3] The assembly committee recognized that there were serious questions regarding the constitutionality of Proposition 15 under the supremacy clause, and extensively discussed this issue in its report. ER at 182-89. Once the Nuclear Laws were enacted, both the California Legislative Counsel and the State Attorney General concluded that these laws were federally preempted. Exhibits A and B to PLF Memorandum in Opposition to Request for Continuance of Summary Judgment Hearing (S.D. Cal. Nov. 8, 1978); *see also* PLF App. 21.

> "'it is clear that from the very beginnings of commercial nuclear power the Congress was aware of the absence of a permanent waste disposal facility, but decided to proceed with power plant licensing.'" 582 F.2d 166, 170 (2d Cir. 1978) (citation omitted).

That court found that "Congress did not intend such a condition" as a prerequisite to licensing. 582 F.2d at 171.

> "[I]f there were any doubt over the intent of Congress . . . not to require a moratorium on nuclear power reactor licensing pending an affirmative determination [on permanent waste disposal], we are persuaded that the matter was laid to rest by enactment of the Energy Reorganization Act of 1974. . . 42 U.S.C. §§ 5801 *et seq.* Therein, Congress expressly recognized and impliedly approved NRC's regulatory scheme and practice. . . ." 582 F.2d at 174.[4]

Thus, neither the NRC nor Congress has chosen to suspend the licensing of new nuclear plants pending the final approval of a waste disposal technology. This Court has made it clear that such a decision preempts contrary action by a state.

> "'[W]here failure of . . . federal officials affirmatively to exercise their full authority takes on the

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[4] Surprisingly, the Ninth Circuit cited the 1974 Energy Reorganization Act in *support* of its claim that federal policy regarding nuclear energy had changed. 659 F.2d at 926-27, PG&E App. 43-44.

The Supreme Court has itself noted the special relevance of Congress's extensive involvement in overseeing the administrative regulation of nuclear energy.

> "It may often be shaky business to attribute significance to the inaction of Congress, but under these circumstances, and considering especially the peculiar responsibility and place of the Joint Committee on Atomic Energy in the statutory scheme, we think it fair to read this history as a *de facto* acquiescence in and ratification of the [AEC's] licensing procedure by Congress." *Power Reactor Dev. Co. v. International Union of Electrical, Radio & Machine Workers*, 367 U.S. 396, 409 (1961).

(The Joint Committee was abolished in 1977. Its functions are now carried out by separate House and Senate committees. 42 U.S.C. §§ 2258-2259.) The Second Circuit quoted this passage in its opinion in *Natural Resources Defense Council*, 582 F.2d at 172.

> character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,' States are not permitted to use their police power to enact such a regulation." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978), *quoting Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 774 (1947).

Like the principle set forth in *Perez* that state legislative reports are not to be given conclusive effect, this principle of preemption goes unmentioned in the Ninth Circuit's decision.

C. California's Nuclear Moratorium Obstructs Federal Policy on an Issue of National Importance

The importance of the Ninth Circuit's ruling is evident from both its subject matter and from the possibility that it will be applied on a national basis. In the recent words of the President, nuclear energy is "[o]ne of the best potential sources of new electrical energy supplies in the coming decades. . . ." Statement Announcing a Series of Policy Initiatives, 17 Weekly Comp. of Pres. Docs. 1101 (Oct. 8, 1981). Given that 23 states filed amicus briefs with the Ninth Circuit in support of California (659 F.2d at 907 n.2, PG&E App. 3 n.2), the court's ruling upholding California's moratorium opens the door to similar state provisions across the country.

The Ninth Circuit ruled that California's moratorium does not obstruct or frustrate national policy regarding nuclear energy. However, aside from a total shutdown of existing nuclear plants, it is difficult to imagine how any state could more effectively block a congressional policy of encouraging nuclear energy development than by categorically prohibiting all new nuclear plants.

It is the across-the-board nature of California's moratorium which is the touchstone in this case. This is not a question of whether an individual proposed plant should or should not be certified. The issue is whether a state may prohibit new power plants, on a categorical basis, solely because they employ nuclear power.

In answering this question in the manner it does, the Ninth Circuit significantly distorts the type of federal policy which *would* be frustrated by the California moratorium. According to the court, such a policy would involve "an intent to promote nuclear power *at all costs.*" 659 F.2d at 926, PG&E App. 42 (emphasis added). Having constructed this straw man as the sine qua non of preemption, it is not surprising that the court fails to find such an extreme policy in the Atomic Energy Act.

The Act sets forth, as one of its objectives,

> "a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public . . . ." 42 U.S.C. § 2013(d).

The fact that Congress may also seek to encourage the utilization of other energy sources does not detract from this stated policy of encouraging nuclear power development and use. The basis upon which to determine whether this policy has been altered is no different from the basis for deciding that Congress has altered "the pervasive regulatory scheme embodied in the [Atomic Energy Act]." *Train*, 426 U.S. at 24. In the Supreme Court's own words, that basis is "the clear indication of legislative intent that we might expect before recognizing such a change in policy." *Id.*

That basis simply does not exist. California's absolute moratorium inescapably "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). By virtue of that frustration of federal policy, California's moratorium should be ruled invalid.

II

CONTRARY TO THE NINTH CIRCUIT, THE DESTRUCTION OF AN INDIVIDUAL'S JOB BY CALIFORNIA'S NUCLEAR MORATORIUM IS A SUFFICIENT BASIS FOR STANDING TO CHALLENGE THAT LAW

The District Court found that "an independent reason the utility company suspended Sundesert was the California Nuclear Laws." 472 F. Supp. at 195, PLF App. 7. The Ninth Circuit decided that "[e]ven if this were true, it would not suffice to give Thornberry standing." 659 F.2d at 913, PG&E App. 14. According to the Ninth Circuit, the fact that it would be up to the utility company, a third party not before the court, to offer Thornberry his job back makes this fact of causation an insufficient basis for standing. This ruling is unjustified.

The "right of the individual . . . to engage in any of the common occupations of life" is among the liberties guaranteed by the Constitution. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The destruction of that right by a state law is a sufficient basis for an injured person to seek judicial redress. While the redressability of injury is undeniably an essential element of standing, this element need only be satisfied to a degree of likelihood. Once that is done, the issue of redressability will not obscure the more basic issue of injury caused by the law being challenged.

This is demonstrated by decisions of this Court dealing with government-caused injuries in which redress depended upon factors or parties beyond the court's jurisdiction. In *Peterson v. City of Greenville*, 373 U.S. 244 (1963), this Court reversed the trespass convictions of sit-in demonstrators who were protesting a local ordinance which required racial segregation at lunch counters. The Court acted despite the claim that the manager of the lunch counter, who was not before the court, would have engaged in discrimination even in the absence of that ordinance:

> "[T]hese convictions cannot stand, *even assuming . . . that the manager would have acted as he did*

> *independently of the existence of the ordinance."* 373 U.S. at 248 (emphasis added).

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), this Court upheld a housing developer's standing to challenge zoning which blocked a proposed project. The Court rejected any need for a "guarantee that [the project] will be built," despite the fact that outside parties would have to provide the "financing" and "federal subsidies" essential to the project. 429 U.S. at 261 and n.7. The Court stated that all such projects "are subject to some extent to similar uncertainties." *Id.* The fact that the challenged zoning stood "as an absolute barrier to" the project sufficed for standing. *Id.* California's nuclear moratorium is no less absolute a barrier to Thornberry's employment at Sundesert.

In *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), this Court allowed an unsuccessful medical school applicant to challenge the school's special admissions program, despite the fact that the applicant might not be admitted in any case:

> "[E]ven if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing. ... The trial court found [a redressable] injury, apart from failure to be admitted, in the University's decision *not to permit Bakke to compete* for all 100 places in the class...." 438 U.S. at 280 n.14 (Powell, J.) (emphasis added).

The nuclear moratorium has no less of an impact on Thornberry's opportunity to apply for work at Sundesert or at any other future nuclear plant.

In *Orr v. Orr*, 440 U.S. 268 (1979), this Court upheld the standing of a divorced man, who was under court order to pay alimony, to challenge Alabama's alimony statutes on the ground that they denied him equal protection by placing the duty to pay alimony only on husbands and not wives. The

Court ruled despite the probability that Alabama would respond to an adverse holding by "extending alimony rights to needy husbands as well as wives." *Id.* at 272; this was a "strong likelihood," according to Rehnquist, J., dissenting, *id.* at 296. Were this to occur, Mr. Orr would not receive redress despite having won his case. Yet the Court stated that the

> "holdings of the Alabama courts stand as a total bar to appellant's relief; his constitutional attack holds the only promise of escape from the burden that derives from the challenged statutes." *Id.* at 273.

The Ninth Circuit's ruling in this case is a similar bar to Thornberry, and invalidation of California's moratorium is the only means by which he can escape from the burden of that law.

Perhaps the closest factual analogy to Thornberry's situation is in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978). A number of organizations and individuals challenged the constitutionality of the Price-Anderson Act, 42 U.S.C. § 2210, alleging that its limitation of nuclear accident liability was the "but for" causal element in the construction of two nuclear plants. The operation of these plants, in turn, would allegedly injure the environment and property values in their vicinity. Regardless of the ruling on Price-Anderson's validity, redress of the alleged injuries would depend on whether or not the Duke Power Company decided to continue with the construction of the plants. Yet this Court upheld standing without even determining if it had jurisdiction over Duke Power:

> "We need not resolve the question of whether Duke Power is a proper party . . . and Duke's presence or absence makes no material difference to either our consideration of the merits of the controversy or our authority to award the requested relief." 438 U.S. at 72 n.16; *see also id.* at 101 (Rehnquist, J., dissenting).

Parties claiming to be injured by nuclear plants thus had standing to challenge the validity of a law which allegedly

made it possible for those plants to be built. There is no reason why Robert Thornberry should not have standing to challenge the law which made it impossible for him to continue working at Sundesert. No less than the parties in *Duke Power,* Thornberry has

> " 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' " *Duke Power,* 438 U.S. at 72, *quoting Baker v. Carr,* 369 U.S. 186, 204 (1962).

Having lost his job at Sundesert as a result of California's nuclear moratorium, he should now be allowed to challenge that law in court.

III

THIS CASE IS APPROPRIATE FOR REVIEW DESPITE THE FACT THAT IT INVOLVES A REVERSAL OF SUMMARY JUDGMENT

In the *PLF* case, the Court of Appeals reversed a summary judgment and remanded the case "for trial or for other proceedings consistent with [its] opinion." 659 F.2d at 928, PG&E App. 46. The court's substantive rulings on the issues of preemption and standing, however, are for all practical purposes final rulings in this case. Its finding that California's nuclear moratorium is not federally preempted puts an end to any further proceedings; it would be futile for Robert Thornberry to further attempt to challenge a state law which has already been ruled valid. If the court's ruling on preemption stands, then its substantive holding on both this issue and on the issue of standing will remain as the final rulings in this case.

The court's rulings are thus appropriate for review "inasmuch as [they are] fundamental to the further conduct of the case." *United States v. General Motors Corp.,* 323 U.S. 373, 377

(1945); *see, e.g., Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964); *Carson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947). As this Court has stated in applying the analogous requirement of finality in reviewing state court judgments, review is appropriate when "the federal issue is conclusive or the outcome of further proceedings [is] pre-ordained." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479 (1975). Thus, the Ninth Circuit's action constitutes a final disposition of the *PLF* case in its entirety.

CONCLUSION

In upholding California's nuclear moratorium, the Ninth Circuit has approved state obstruction of an important and explicit congressional policy—the encouragement of nuclear energy development and use. The importance of this ruling is emphasized by the unprecedented energy shortages of recent years; the potential of the ruling to open the door to widespread obstruction is demonstrated by the participation of over 20 states in the court below in support of California.

In reaching its decision, the Ninth Circuit ignored Supreme Court rulings on dealing with preemption disputes. It gave conclusive weight to a state assembly committee report, despite this Court's characterization of such an approach as "aberrational." It ignored the preemptive effect of the federal government's decision to proceed with nuclear energy development in the absence of an approved means of storing nuclear wastes. It disregarded the national policy to promote this energy source, which is explicitly stated in the Atomic Energy Act. Finally, it denied standing to an individual who had been thrown out of a job by the very law he sought to challenge.

For these reasons, and for the other reasons set forth above, this petition for certiorari should be granted.

Respectfully submitted,

RONALD A. ZUMBRUN
ROBIN L. RIVETT
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154

RAYMOND M. MOMBOISSE
SAM KAZMAN
Pacific Legal Foundation
1990 M Street, N.W., Suite 550
Washington, D.C. 20036
Telephone: (202) 466-2686

Attorneys for Petitioners

April 20, 1982

Appendix

OPINION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 78-711-E

PACIFIC LEGAL FOUNDATION, a nonprofit California corporation; THE SAN DIEGO COALITION, a nonprofit California corporation; SAN DIEGO SECTION OF THE AMERICAN NUCLEAR SOCIETY, a New York corporation; SAN DIEGO COUNTY BUILDING AND CONSTRUCTION TRADES COUNCIL, a labor organization; and ROBERT C. THORNBERRY, an individual,

Plaintiffs,

v.

STATE ENERGY RESOURCES CONSERVATION & DEVELOPMENT COMMISSION, a state agency; RICHARD L. MAULLIN, Chairman; and Commissioners EMILIO E. VARANINI, III, ARLAND D. PASTERNAK, C. SUZANNE REED, and RONALD D. DOCTOR,

Defendants.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,

Defendants-Intervenors.

William B. Enright, Judge — Filed March 6, 1979

MEMORANDUM DECISION

This case involves a challenge to the constitutionality of three sections of the California Public Resources Code: sections 25524.1, 25524.2 and 25524.3. Plaintiffs contend that these sections, which impose certain requirements on the certification of nuclear fission thermal power plants in this state, invade a field of regulation which has been preempted by the federal

government. Specifically, plaintiffs assert that the Atomic Energy Act of 1954, *as amended*, 42 U.S.C. §§ 2011-2281 (1970), preempts the state laws in question.

Before the court for resolution are plaintiffs' motion for summary judgment, defendants' motion to reconsider the motion to dismiss the complaint or, in the alternative, to certify an interlocutory appeal, and cross motions brought to strike the various affidavits and exhibits filed both parties. Upon due consideration of the memoranda filed by the parties, the declarations and exhibits, and the arguments of counsel, and for the reasons set forth herein, the court rules as follows: the motion to reconsider the motion to dismiss is denied, as is the motion to certify an interlocutory appeal, plaintiffs' motion for summary judgment is granted, and the various motions to strike are resolved as set forth below.

Originally, the federal government retained exclusive authority over the development and use of atomic energy. Act of Aug. 1, 1946, ch. 724, 60 Stat. 755. In 1954, Congress recognized that private businesses might play a role in the peaceful development and generation of nuclear power. Congress passed the Atomic Energy Act of 1954, *as amended*, 42 U.S.C. §§ 2011-2281 (1970), establishing the Atomic Energy Commission (AEC)[1] to regulate and promote the use of nuclear energy. Licensing and regulation of nuclear materials was subject to federal authority, in order to ensure public safety and national security. *Id.* § 2012.

In 1959, Congress sought to define the States' role in the regulation of nuclear materials by enacting amendments to the Atomic Energy Act. *Id.* § 2021. The amendments recognized the States' interest in the peaceful use of atomic energy and proposed to establish procedures whereby certain of the AEC's

[1] In 1974, the Energy Reorganization Act became law, transferring the licensing and regulatory functions of the Atomic Energy Commission to the Nuclear Regulatory Commission (NRC). 42 U.S.C. § 5841(f). The AEC's previous research and development functions were transferred to the Energy Research and Development Agency and, later, to the Department of Energy. *Id.* §§ 7101-7352. Thus, while the NRC is the successor agency to the AEC, it retains only licensing and regulatory functions.

regulatory authority over source, by-product and special nuclear materials could be assumed by the States. The amendments provide for agreements between the governor of a State and the AEC to accomplish this purpose.

The amendments set forth specific limits on the delegation of regulatory authority with regard to nuclear materials. The federal government retained responsibility for regulating "the construction and operation of any production or utilization facility," the import or export of nuclear materials, and the disposal of nuclear materials that the AEC decides shall not be disposed of without a license. *Id.* § 2021(c). The amendments also provided that the States may regulate "activities for purposes other than protection against radiation hazards." *Id.* § 2021(k).

In 1974, the California legislature enacted the Warren-Alquist State Energy Resources Conservation and Development Act, establishing a comprehensive power-plant siting procedure for new thermal-electric power plants and vesting exclusive jurisdiction to approve such power plants in the State Energy Resources Conservation and Development Commission. Cal.Pub.Res.Code §§ 25000-25968. The Energy Commission must review safety and reliability factors for all types of thermal power plants. *Id.* §§ 25001 & 25511. In 1976, three statutes imposing certain requirements for the construction of nuclear power plants were added. Cal.Pub.Res.Code §§ 25524.1, 25524.2 & 25524.3. These three sections are the subject of the instant lawsuit. Plaintiffs contend that these three sections of the Public Resources Code, referred to herein as the California Nuclear Laws, invade a field of regulation which has been preempted by the federal government under the Atomic Energy Act of 1954.

California Public Resources Code section 25524.1(a) provides that no new nuclear fission thermal power plant requiring the reprocessing of fuel rods shall be permitted land use in the state or certified by the Energy Commission until (1) the Energy Commission finds that the United States agency has approved a technology for the construction and operation of nuclear fuel rod reprocessing plants and (2) the commission

has reported its findings to the state legislature, which has the power to disaffirm them. Subsection (b) of this statute requires the state commission to make a case-by-case determination that adequate fuel rod reprocessing capacity or waste storage capacity will be available by the time a particular facility requires reprocessing or waste storage.

Section 25524.2 provides that no nuclear power plant shall be certified by the state commission until it finds (1) that the authorized United States agency has approved a technology for disposal of high-level nuclear wastes and (2) the commission has reported its findings to the state legislature, which has the power to disaffirm them.

Section 25524.3 applies to nuclear power plants for which notices of intent are filed with and accepted by the state commission after January 1, 1980. The Commission cannot certify these plants until (1) the commission completes a study of the necessity, effectiveness and economic feasibility of berm containment and locating reactors underground and (2) the legislature evaluates the study.

California Public Resources Code section 25524.25 required the California Energy Commission to inform the legislature by January 1978 whether the findings on fuel rod reprocessing and waste disposal could be made. The Energy Commission has concluded that section 25524.1(a), referring only to power plants that require nuclear fuel rod reprocessing, is not applicable because reprocessing is not required by the federal government nor required by technical operational requirements. *In the Matter of Implementation of Nuclear Reprocessing and Waste Disposal Statutes,* No. 76—NL—1, 76—NL—3, at 5 (Jan. 25, 1978). As to subsection 25524.1(b), the commission determined that it will, as mandated by statute, evaluate on a case-by-case basis the fuel storage capacity at individual reactor sites. *Id.* The commission found that the findings required by section 25524.2 could not be made because the federal agencies have not approved a waste disposal technology. *Id.*

With respect to section 25524.3, the commission has reported that rules and regulations on undergrounding and

berm containment are not warranted. Staff of California Energy Commission, *Draft, Underground Siting of Nuclear Power Reactors: An Option for California: A Summary of the Technical and Economic Implications with Recommendations* iv, v, xi, 9—4 (June 1978). The Energy Commission has adopted this report. *In the Matter of Determinations of the Commission Pursuant to Public Resources Code Section 25524.3,* No. 76—NL—2 (Sept. 13, 1978).

I

As a preliminary matter, the court notes that sections 25524.1 and 25524.3 have been rendered moot by the decisions of the California Energy Commission. The commission has determined that section 25524.1(a) does not apply to any reactors proposed for California. Section 25524.1(b) requires a case-by-case evaluation of fuel storage capacity at individual reactor sites. No particular storage capacity is specified. Plaintiffs have failed to demonstrate how this section impedes the development of nuclear power in California.

Similarly, section 25524.3 is not implicated in the present controversy. By its terms, this section applies only to power plants for which a notice of intent is accepted after January 1, 1980.

Plaintiffs argue that the federal government could reinstitute a reprocessing requirement, at which time the California statute would apply. In the event that action occurred, plaintiffs could institute a challenge at that time. Issues will not be found moot if they are capable of repetition, yet likely to evade review. *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). While the issues presented here might be capable of repetition, plaintiffs have not shown that these issues are likely to evade review if a reprocessing requirement is instituted.

Accordingly, the court concludes that only section 25524.2, requiring the existence and approval of a high level waste disposal technology which the Energy Commission has determined not to exist, presently impedes certification of nuclear power plants in California.

II

Before proceeding to the substantive issue of preemption, the court must determine that plaintiffs have a personal stake in the outcome of the controversy, entitling them to invoke the court's determination of the constitutional issues presented. For purposes of the motion for summary judgment, plaintiffs rely on their allegations of lost jobs and harm to the environment as providing standing to sue. Defendants contend that plaintiffs' declarations and exhibits offered in support of their alleged injuries are incompetent and speculative. Further, defendants claim that their own affidavits place many of the alleged effects of alternate energy source development at issue, and raise a factual dispute as to the existence of the alleged injuries.

The court finds it unnecessary to rule on the numerous objections to the declarations and exhibits filed by both parties. Only one plaintiff, Robert Thornberry, has presented evidence of a particularized injury due to the California Nuclear Law.[2] As to this plaintiff's injury, the facts are unequivocal.

Thornberry was hired by San Diego Gas and Electric Company and assigned to work on the licensing of the Sundesert nuclear power project in Southern California. Shortly after San Diego Gas and Electric Company's board of directors resolved to terminate the Sundesert project, Mr. Thornberry lost his job due to a reduction in force.

Defendants do not dispute that Thornberry suffered an injury. Nor do they dispute that Thornberry lost his job as a result of the suspension of Sundesert. However, they attack the

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[2] With the exception of plaintiff Robert Thornberry's declaration and exhibits, the declarations offered in support of plaintiffs' standing to sue fail to demonstrate a concrete injury as a result of the California Nuclear Laws. The court finds the general allegations of lost jobs and environmental harm to be speculative, conclusory and unsupported by specific facts. In addition, no casual connection between the alleged injuries and the California Nuclear Laws is conclusively established. In contrast, the court finds Thornberry's injury to be concrete and traceable to the Energy Commission's decisions effectively placing a moratorium on the development of nuclear power plants in California.

causal connection in another way, arguing that Thornberry's injury is not a result of the California Nuclear Laws because the Sundesert project would have been terminated in any event due to the utility company's inability to secure a general rate increase to finance work in progress.

Plaintiffs agree that financial impediments contributed to the demise of Sundesert. However, plaintiffs submit that an independent reason the utility company suspended Sundesert was the California Nuclear Laws. This contention is supported by the resolution of San Diego Gas and Electric Company's board of directors, listing the utility's failure to obtain an exemption from the nuclear laws as one reason for suspending the Sundesert project. This contention is uncontroverted by defendants' declarations, which state only that in the declarants' opinions Sundesert was closed due to failure to obtain a rate increase.

Although the causal connection is indirect, the connection is sufficient to provide standing. *Duke Power Company v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 75 n.20, 98 S.Ct. 2620, 2631 n.20, 57 L.Ed.2d 595, 612 n.20 (1978); *United States v. SCRAP*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973). As revealed by the utility's board of directors, the California Nuclear Laws were perceived as a substantial impediment to final certification of the Sundesert power plan and additional expenditures were authorized only until the company had time to pursue an exemption from these laws. The court finds a "substantial likelihood" that the Sundesert project would proceed absent the California Nuclear Laws and that Thornberry would not have been terminated. *Duke Power Company v. Carolina Environmental Study Group, Inc., supra; Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 261, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).

III

Defendants have also questioned the ripeness of the issues for judicial resolution, both by seeking a reconsideration of this

court's ruling on the motion to dismiss and by various declarations which defendants claim raise factual disputes as to ripeness.

The rationale for the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner* 387 U.S. 136, 148-49, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967).

In the present case a moratorium has been effected by formal agency action. The California Energy Commission has determined that the specified findings on waste disposal, without which no nuclear power plant may be certified, cannot be made. Indisputably, no nuclear power plants can be licensed in California, at least temporarily. Even Professor Tribe, a strong proponent of the California Nuclear Laws, has concluded:

> "In light of the findings in its decision, the Energy Commission cannot presently certify any nuclear fission thermal power plants. The conditions imposed by the nuclear provisions will prevent such certification until the technology or means for disposing of high-level radioactive wastes actually exists, and is approved by the federal government. The Energy Commission projects that such capability will be available no sooner than the mid-1980's; the time required may easily extend into the 1990's."

Tribe, *California Declines the Nuclear Gamble: Is Such a State Choice Preempted?*, 7 *ECOLOGY L.Q.* 679, 683 (1979) (footnotes omitted).

Plaintiff Thornberry has demonstrated that he feels the effects of the moratorium in a concrete way. As a result of San Diego Gas and Electric Company's failure to gain an exemption from the California Nuclear Laws for its Sundesert project, Mr. Thornberry lost his job. This plaintiff has demonstrated that the moratorium itself contributed to the suspension of Sundesert and caused his injuries.

PREEMPTION OF PUBLIC RESOURCES CODE SECTION 25524.2

The doctrine of federal preemption of state authority has its origin in the "Supremacy Clause" of Article VI of the Constitution, which declares that;

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

When, as here, a State's exercise of its police power is challenged under the Supremacy Clause, a federal court must commence its analysis "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 98 S.Ct. 988, 994, 55 L.Ed.2d 179 (1978). One of the legitimate inquiries is whether Congress has either explicitly or implicitly prohibited the States from regulating matters which relate to nuclear waste disposal or to the construction and operation of nuclear power plants.

Express preemption occurs when Congress has expressly stated either in a federal statute or in the legislative history pertaining thereto that federal regulation was intended to be exclusive. *Railway Employees' Department v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956); *Pennsylvania v. Nelson*, 350 U.S. 497, 501-02, 76 S.Ct. 477, 479, 100 L.Ed. 640 (1956); *Schwabacher v. United States*, 334 U.S. 182, 197, 68 S.Ct. 958, 966, 92 L.Ed. 1305 (1948).

Even in the absence of an express Congressional declaration that federal regulation is intended to be exclusive, federal preemption may be found by implication:

> "[The Congressional] purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference

> that Congress left no room for the States to Supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. . . ."

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947).

Finally, even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. *Ray v. Atlantic Richfield Co., supra,* 435 U.S. at 158, 98 S.Ct. at 994. A conflict in this sense may be found in at least two types of circumstances. First, conflict preemption will occur "where compliance with both federal and state regulation is a physical impossibility." *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963). Second, a conflict will be found where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941).

Applying the foregoing principles of law, the court finds California Public Resources Code section 25524.2 preempted both because Congress has impliedly foreclosed state legislation on the subject of nuclear waste disposal and, alternatively, because the statute stands as an obstacle to the purposes and objectives of Congress as stated in the Atomic Energy Act of 1954, *as amended,* 42 U.S.C. § 2011 *et seq.*

IMPLIED PREEMPTION

The issue of whether the federal government has preempted the sphere of radiological hazard regulation is not a matter of first impression in the federal courts. Thus far the issue has been squarely confronted in two cases, and in both instances a

conclusion of implied preemption was reached. *Northern States Power Company v. State of Minnesota,* 447 F.2d 1143 (8th Cir. 1971), *aff'd mem., Minnesota v. Northern States Power Co.,* 405 U.S. 1035, 92 S.Ct. 1307, 31 L.Ed.2d 576 (1972); *United States v. City of New York,* 463 F. Supp. 604 (S.D.N.Y.1978).

Minnesota, like California in the case at bar, attempted to regulate on the subject of radioactive waste disposal. Acting through its Pollution Control Agency, it established stringent standards for radioactive liquid and gaseous discharges from nuclear power plants licensed by the Atomic Energy Commission (AEC). The *Northern States* court, emphasizing the importance of the interrelationship between subsections (c) and (k) of 42 U.S.C. § 2021,[3] interpreted the Atomic Energy Act, *as amended,* to preclude concurrent state regulation of matters reserved to the AEC in section 2021(c) and found the Minnesota regulation preempted.[4] The Court arrived at this conclusion after a thorough examination of the legislative history pertaining to the Atomic Energy Act of 1954 and its subsequent amendment in 1959. The *Northern States* holding was extensively relied upon by a District Court which reached a similar result in *United States v. City of New York, supra.* In that case the court found that a provision of the New York City Health Code purporting to require licensing by the Commissioner of Health as a precondition to nuclear reactor operation was unconstitutional insofar as it had been impliedly preempted by the Atomic Energy Act.

Defendants apparently do not contest the reasoning and result of the courts in *Northern States* and *United States v. City*

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[3] 447 F.2d at 1149.

[4] "We are more concerned here with subsection (c) of § 2021 which *prohibits* the AEC from discontinuing its authority and responsibility with respect to the regulation of certain specified activities .... Minnesota interprets this subsection only as prohibiting *total* relinquishment by the federal government over nuclear power plants, but does not view the concurrent exercise of state control over nuclear facilities as being forbidden by the Act... We cannot agree with Minnesota's position that dual control over atomic power plants and the level of effluents discharged therefrom is permissible under the Act...." 447 F.2d at 1149.

of New York except insofar as they make certain arguments from the Clean Air Act amendments of 1977.[5] Instead, they seek to avoid the effect of these decisions by distinguishing them. Relying principally upon section 2021(k), defendants urge the court to uphold Public Resources Code section 25524.2 on the basis that the statute regulates "activities for purposes other than protection against radiation hazards." 42 U.S.C. § 2021(k). They suggest that section 25524.2 is valid because it was not enacted for the prohibited purpose of radiation control. Rather, the argument runs, it was enacted for the economic purpose of insuring that Californians will not have to bear the financial risk of funding nuclear power plants which may later be shut down because of inadequate permanent waste disposal facilities.

Initially, the court would note that defendants' argument rests upon an exceedingly broad interpretation of section 2021(k). The underlying premise seems to be that any sort of regulation at all is permissible as long as a state legislature is willing and ingenious enough to conjure up a legislative purpose other than radiation control. The evil inherent in giving conclusive effect to declared state legislative purposes to uphold a state statute or regulation which would otherwise be preempted has previously been recognized by the Supreme Court. *Perez v. Campbell,* 402 U.S. 637, 651-52, 91 S.Ct. 1704,

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[5] Defendants suggest that the 1977 amendments to the Clean Air Act, 42 U.S.C. § 7401 *et seq.,* manifest an intent of Congress to legislatively overrule *Northern States Power Company v. State of Minnesota,* 447 F.2d 1143 (8th Cir. 1971. Although the legislative history of the amendments appears to indicate Congressional disapproval of *Northern States* in the narrow context of radioactive air pollution, *see* House Rep. No. 95-564 at 143, there is no basis for the supposition that Congress disapproved of the decision in other contexts, such as, for example, nuclear waste disposal. Indeed, the legislative history of the amendments seems to affirmatively show that Congress was aware of the *Northern States* case and, except in the context of radioactive air pollution, declined to upset the major part of the holding.

1712, 29 L.Ed.2d 233 (1971).[6] It would appear that under defendants' suggested interpretation of section 2021(k) the Minnesota regulation held unconstitutional in *Northern States* would have successfully withstood a preemption challenge if the Minnesota Pollution Control Agency or some other state authority had asserted the purpose of the regulation to be the minimization of future medical costs associated with a high incidence of cancer precipitated by the radioactive effluvia from the nuclear power plants.

More generally, the danger inherent in interpreting section 2021(k) in the broad manner defendants suggest is that the zone of exclusive federal regulation under section 2021(c) could readily be nullified through careful tailoring of state legislative purposes. If section 2021(k) is broadly interpreted to validate any state statute or regulation as long as there appears a stated purpose other than protection against radiation hazard, then the States would effectively be permitted to intrude into the preempted sphere and regulate radiation hazard under the guise of a permitted legislative purpose. It is scarcely credible that Congress, in enacting section 2021(k), intended to furnish the States with a means of evading and undermining the NRC's exclusive regulatory authority under section 2021(c). Rather, the better inference would seem to be that Congress envisioned that section 2021(k) would be interpreted in such a fashion as not to nullify what Congress provided in section 2021(c).

The legislative history of the 1959 amendments to the Atomic Energy Act of 1954 somewhat lends support to the view

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[6] The Court wrote in *Perez*: "We can no longer adhere to the aberrational doctrine of *Kesler* [*v. Dept. of Pub. Safety*, 369 U.S. 153, 82 S.Ct. 807, 7 L.Ed.2d 641] and *Reitz* [*v. Mealey*, 314 U.S. 33, 62 S.Ct. 241, 241, 86 L.Ed. 21] that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. Apart from the fact that it is at odds with the approach taken in nearly all our Supremacy Clause cases, such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law." 402 U.S. at 651-52, 91 S.Ct. at 1712.

that Congress commended to the federal courts the task of interpreting section 2021(k) in a manner harmonious with section 2021(c). At the conclusion of the May 1959 hearings, the Joint Committee on Atomic Energy proposed to amend what is presently section 2021(k) as follows:

> "It is the intention of this Act that State laws and regulations concerning the control of radiation hazards from byproduct, source, and special nuclear materials shall not be applicable except pursuant to an agreement entered into with the Commission pursuant to subsection b . . . ."[7]

Subsequently, the General Manager of the AEC sent a letter to Chairman Anderson of the Joint Committee recommending deletion of this sentence:

> "At the hearing, we recommended the omission of the sentence. . . . In suggesting the elimination of the sentence, we did not intend to leave any room for the exercise of concurrent jurisdiction by the States to control radiation from those materials. *Our sole purpose was to leave room for the courts to determine the applicability of particular State laws and regulations dealing with matters on the fringe of the preempted area in the light of all the provisions and purposes of the Atomic Energy Act, rather than in the light of a single sentence.*"[8]

The Joint Committee adopted the AEC's suggestion and accordingly deleted the sentence. The weight given by the Joint Committee to the AEC's interpretation of section 2021(k) seems to indicate Congressional approval of the position that the precise extent of preemption under the section is to be

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[7] *Hearings Before the Joint Comm. on Atomic Energy on Federal-State Relationships in the Atomic Energy Field*, 86th Cong., 1st Sess. 488 (1959). (*Joint Comm. Hearings*).

[8] *Joint Comm. Hearings* at 500. (Emphasis added)

determined by the courts in the light of all the provisions and purposes of the Atomic Energy Act.[9]

For the reasons stated above, the court finds itself unable to interpret section 2021(k) as giving conclusive effect to a declared state legislative purpose for purposes of determining the validity of a state statute or regulation under the section. That California may have predicated Public Resources Code section 25524.2 upon an economic purpose is not a sufficient condition for a finding of constitutionality. Instead of focusing narrowly on the issue of California's legislative purpose, the court will examine whether section 25524.2 impinges upon the sphere of exclusive regulatory jurisdiction reserved to the NRC in section 2021(c).

Section 2021(c) provides that the NRC shall retain authority and responsibility with respect to the regulation of the construction and operation of nuclear power plants and with respect to the regulation of nuclear waste disposal.[10] In the exercise of its discretion, the NRC has decided not to require the existence of a technology for the permanent disposal of nuclear waste as a condition precedent for the construction and operation of nuclear reactors. The NRC's decision in this regard falls within the preempted sphere because it relates to, touches upon and involves the regulation of radiation hazard pertaining to the construction and operation of nuclear power plants and to nuclear waste disposal. California has decided otherwise, decreeing that no nuclear power plant may be constructed in the State of California unless there exists a demonstrated technology for the disposal of nuclear waste. The court finds that the question of whether nuclear power plants may be constructed and operated in the absence of a demonstrated technology for the permanent disposal of nuclear waste

[9] *See* Murphy & La Pierre, *Nuclear 'Moratorium' Legislation in the States and the Supremacy Clause: A Case of Express Preemption*, 76 Colum.L.Rev. 392, 398-405 (1976): "As the AEC recognized, the exact bounds of state regulation for these 'other' purposes, which may have incidental effect on materials or facilities licensed by the Commission, cannot readily be determined. But it is only in this regard that section 274 [42 U.S.C. § 202] leaves the precise extent of preemption to be answered by the courts."

[10] 42 U.S.C. § 2021(c)(1), 2021(c)(4).

is exclusively reserved to the NRC by section 2021(c) and that state regulaton on this subject is displaced. Accordingly, the court holds California Public Resources Code section 25524.2 impliedly preempted.

PUBLIC RESOURCES CODE § 25524.2 AS AN OBSTACLE TO THE PURPOSES AND OBJECTIVES OF CONGRESS

Assuming *arguendo* that Congress has not completely foreclosed state regulation on the subject of radiation hazard control, California Public Resources Code section 25524.2 is nonetheless void because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581(1941), in encouraging and fostering the development, use and control of atomic energy.

The substantive provisions of the Atomic Energy Act of 1954 are preceded by general statutory provisions which set forth Congressional findings, a Congressional declaration of policy and Congressional purposes. 42 U.S.C. §§ 2011, 2012, 2013. These provisions appear to provide an excellent means of gauging the "purposes and objectives of Congress" within the meaning of the *Hines* decision. Section 2011 indicates that the development, use and control of atomic energy for the purpose of achieving certain ends is declared to be the policy of the United States. Section 2012 asserts as a Congressional finding that "[t]he development, utilization, and control of atomic energy for military and for all other purposes are vital to the common defense and security." 42 U.S.C. § 2012(a). Section 2013 manifests the intent of Congress to provide for "a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes. . . ." 42 U.S.C. § 2013(d). When taken together, the foregoing provisions of law suggest that Congress contemplated the ongoing *development* of nuclear energy, subject to state and federal regulation. The court in *Northern States* reached a similar conclusion as to the import of these statutory provisions:

> "Congressional objectives expressed in the 1954 Act evince a legislative design to foster and encourage the

> development, use and control of atomic energy so as to make the maximum contribution to the general welfare and to increase the standard of living. 42 U.S.C. §§ 2011, 2012."

Northern States Power Company v. State of Minnesota, supra, 447 F.2d at 1153.

Congress' policy to encourage the development and utilization of nuclear energy would decidedly be frustrated if all fifty states had statutes similar to California Public Resources Code section 25524.2. Although the Atomic Energy Act certainly leaves room for the states to regulate on the subject of nuclear energy within the confines of section 2021(k) and 2021(b), the power to regulate is not necessarily the power to prohibit. There seems little point in enacting an Atomic Energy Act and establishing a federal agency to promulgate extensive and pervasive regulations on the subject of construction and operation of nuclear reactors and the disposal of nuclear waste if it is within the prerogative of the states to outlaw the use of atomic energy within their borders.

The court finds its conclusion of preemption strengthened by the analogous case of *First Iowa Hydro-Electric Cooperative v. Federal Power Commission,* 328 U.S. 152, 66 S.Ct. 906, 90 L.Ed. 1143 (1946). In that case First Iowa Hydro-Electric Cooperative (First Iowa) sought to construct and operate a dam on the Cedar River in Iowa. Its application to the Federal Power Commission (FPC) for a license was denied on the basis that First Iowa had failed to submit satisfactory evidence of compliance with the laws of the State of Iowa. Among these laws was a statute requiring a party proposing to construct a dam to obtain a permit from the State Executive Council.

The Supreme Court found the FPC's denial of First Iowa's application unwarranted under the Federal Water Power Act and declined to interpret the Act as requiring a license applicant to demonstrate compliance with state laws. The Court held that the purpose of the Act was to promote the comprehensive development of water resources of the United States; that the

detailed provisions of the Act providing for the federal plan of regulation left no room or need for conflicting state controls.[11]

First Iowa appears to indicate that states cannot enact legislation which tends to frustrate national plans to develop resources for use in interstate commerce. Public Resources Code section 25524.2 is consequently preempted because it would seriously disrupt the national plan and policy of Congress for the development of nuclear energy.[12] The statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in developing the peaceful use of atomic energy.

Defendants have eloquently and articulately apprised the court of their concerns relative to the practicality and advisability of the use of nuclear energy as an alternative power source. The arguments advanced by defendants with respect to this subject are indeed weighty and not lacking in appeal. However, it is the province and duty of this court "to say what the law is," *Marbury v. Madison,* 1 Cranch. 137, 2 L.Ed. 60(1803), rather than to pass on the public policy question of whether the states ought to utilize or not to utilize atomic energy or whether the federal government ought to grant autonomy to the states on the nuclear question. Many of the arguments made before this court, therefore, would seem more appropriately presented to Congress.

For the reasons stated above, the court declares California Public Resources Code section 25524.2 unconstitutional.

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[11] 328 U.S. at 180-181, 66 S.Ct. at 919-920.

[12] *See* Murphy & La Pierre, *Nuclear 'Moratorium' Legislation in the States and the Supremacy Clause: A Case of Express Preemption,* 76 Colum.L.Rev. 392, 447-450 (1976).

ORDER OF THE COURT OF APPEALS DENYING REHEARING

United States Court of Appeals

FOR THE NINTH CIRCUIT

Nos. 79-3365, 79-3382, 80-4265, 80-4273

PACIFIC LEGAL FOUNDATION, a California Nonprofit Corporation, *et al.*,
Plaintiffs-Appellees,

v.

STATE ENERGY RESOURCES CONSERVATION & DEVELOPMENT COMMISSION, a state agency, *et al.*,
Defendants-Appellants.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Defendants-Intervenors-Appellants.

PACIFIC GAS AND ELECTRIC CO. and SOUTHERN CALIFORNIA EDISON CO.,
Plaintiffs-Appellees,

v.

STATE ENERGY RESOURCES CONSERVATION & DEVELOPMENT COMMISSION, a state agency, *et al.*,
Defendants-Appellants.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Defendants-Intervenors-Appellants.

Before FLETCHER and FERGUSON, Circuit Judges and FITZGERALD, District Judge.

Filed January 20, 1982

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Fletcher and Ferguson have voted to reject the suggestion for a rehearing en banc, and Judge Fitzgerald has recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

ANNOTATIONS TO CALIFORNIA PUBLIC RESOURCES CODE § 25524.2

Historical Note

Section 2 of Stats.1976, c. 196, p.____, provided:

"The provisions of this act shall not become operative if Proposition 15 of the June 1976 election is adopted by the people, whether or not this bill is chaptered before or after such adoption." [Proposition 15, Nuclear Power Plants, was rejected by the people on June 8, 1976.]

[Reprinted from CAL. PUB. RES. CODE (West 1977)]

1. Validity

Sections 25524.1, this section and 25524.3, imposing state regulatory authority over certain aspects of the development, construction and operation of nuclear power plants are preempted by the federal regulatory scheme with respect to nuclear energy and therefore are in violation of the Supremacy Clause of the United States Constitution. 61 Ops.Atty.Gen. 159, 4-25-78.

[Reprinted from CAL. PUB. RES. CODE (West Supp. 1982)]

TEXT OF PROPOSITION 15

This initiative measure proposes to add a Title 7.8 to the Government Code. It does not amend any existing law.

PROPOSED LAW

Sec. 1. Title 7.8 (commencing with Section 67500) is added to the Government Code, to read:

TITLE 7.8 LAND USE AND NUCLEAR POWER LIABILITY AND SAFEGUARDS ACT

67500. This title shall be known and may be cited as the Nuclear Safeguards Act.

67501. The people and the State of California hereby find and declare that nuclear power plants can have a profound effect on the planning for, and the use of, large areas of the state, as do related facilities connected with the manufacture, transportation, and storage of nuclear fuel, and the transportation, reprocessing, storage, and disposal of radioactive materials from nuclear fission power plants.

67502. The people further find and declare that substantial questions have been raised concerning the effect of nuclear fission power plants on land use and land use planning, as well as on public health and safety. Such questions include, but are not limited to, (a) the reliability of the performance of such plants, with serious economic, security, health, and safety consequences; (b) the reliability of the emergency safety systems for such plants; (c) the security of such plants, and of systems of transportation, reprocessing, and disposal or storage of wastes from such plants from earthquakes, other acts of God, theft, sabotage, and the like; (d) the state of knowledge regarding ways to store safely or adequately dispose of the radioactive waste products from nuclear fission power plants and related facilities; and (e) the creation by one generation of potentially catastrophic hazards for future generations.

67503. A nuclear fission power plant and related facilities may be a permitted land use in the State of California and its waters and considered to be reasonably safe and susceptible to rational land use planning, and may be licensed by state or local agencies, and may be constructed in the state only if all of the following conditions are met:

(a) after one year from the date of the passage of this measure, the liability limits imposed by the federal government have been removed and full compensation assured, either by law or waiver, as determined by a California court of competent jurisdiction and subject to the normal rights of appeal, for the people and businesses of California in the event of personal injury, property damage, or economic losses resulting from escape or diversion of radioactivity or radioactive materials from a nuclear fission power plant, and from escape or diversion of radioactivity or radioactive materials in the preparation, transportation, reprocessing, and storage or disposal of such materials associated with such a plant; and

(b) after five years from the date of the passage of this measure.

(1) the effectiveness of all safety systems, including but not limited to the emergency core cooling system, of any nuclear fission power plant operating or to be operated in the State of California is demonstrated, by comprehensively testing in actual operation substantially similar physical systems, to the satisfaction of the Legislature, subject to the procedures specified in Section 67507; and

(2) the radioactive wastes from such a plant can be stored or disposed of, with no reasonable chance, as determined by the Legislature, subject to the procedures specified in Section 67507, of intentional or unintentional escape of such wastes or radioactivity into the natural environment which will eventually adversely affect the land or the people of the State of California, whether due to imperfect storage technologies, earthquakes or other acts of God, theft, sabotage, acts of war, governmental or social instabilities, or whatever other sources the Legislature may deem to be reasonably possible.

67504. (a) If within one year from the date of the passage of this measure the provisions of subsection 67503(a) have not been met, then each existing nuclear fission power plant and such plants under construction failing to meet the conditions specified in subsection 67503(a) shall not be operated at any time at more than sixty per cent of the original licensed core power level of such plant.

(b) Beginning five years from the date of the passage of this measure, each existing nuclear fission power plant and each such plant under construction shall not be operated at any time at more than sixty per cent of the licensed core power level of such plant and shall thereafter be derated at a rate of ten per cent per year of the licensed core power level of such plant, and shall not be operated at any time in excess of such reduced core power level, unless all of the conditions enumerated in Section 67503 are met.

67505. The provisions of Sections 67503 and 67504 shall not apply to small-scale nuclear fission reactors used exclusively for medical or experimental purposes.

67506. One year from the date of the passage of this measure, the Legislature shall initiate the hearing process specified in Section 67507, and, within three years from the date of the passage of this measure, determine whether it is reasonable to expect that the conditions specified in Section 67503(b) will be met. Unless the Legislature determines that it is reasonable to expect that the conditions of Section 67503(b) will be met, then nuclear fission power plants shall be a permitted land use in California only if such existing plants and such plants under construction are operated at no more than sixty per cent of their licensed core power level. Unless the determinations specified in this section are made in the affirmative, then neither the siting nor the construction of nuclear fission power plants or related facilities shall be a permitted land use in California.

67507. The determinations of the Legislature made pursuant to subsection 67503(b) and Section 67507 shall be made only after sufficient findings and only by a two-thirds vote of each house.

(a) To advise it in these determinations, the Legislature shall appoint an advisory group of at least fifteen (15) persons, comprised of distinguished experts in the fields of nuclear engineering, nuclear weaponry, land use planning, cancer research, sabotage techniques, security systems, public health, geology, seismology, energy resources, liability insurance, transportation security, and environmental sciences; as well as concerned citizens. The membership of this advisory group shall represent the full range of opinion on the relevant questions. The group shall solicit opinions and information from responsible interested parties, and hold widely publicized public hearings, after adequate notice, in various parts of the State prior to preparing its final report. At such hearings an opportunity to testify shall be given to all persons and an opportunity to cross-examine witnesses shall be given to all interested parties, within reasonable limits of time. The advisory group shall make public a final report, including minority reports if necessary, containing its findings, conclusions, and recommendations. Such report shall be summarized in plain language and made available to the general public at no more than the cost of reproduction.

(b) To ensure full public participation in the determinations specified in subsection 67503(b) and Section 67506, the Legislature shall also hold open and public hearings, within a reasonable time after the publication of the report specified in subsection (a) of this section, and before making its findings, giving full and adequate notice, and an opportunity to testify to all persons and the right to cross-examine witnesses to all interested parties, within reasonable limits of time.

(c) All documents, records, studies, analyses, testimony, and the like submitted to the Legislature in conjunction with its determinations specified in subsection 67503(b) and Section 67506, or to the advisory group described in subsection (a) of this section, shall be made available to the general public at no more than the cost of reproduction.

(d) No more than one-third of the members of the advisory group specified in this section shall have, during the two years prior to their appointment to the group, received any

substantial portion of their income directly or indirectly from any individual, association, corporation, or governmental agency engaged in the research, development, promotion, manufacture, construction, sale, utilization, or regulation of nuclear fission power plants or their components.

(e) The members of the advisory group shall serve without compensation, but shall be reimbursed for the actual and necessary expenses incurred in the performance of their duties to the extent that reimbursement is not otherwise provided by another public agency. Members who are not employees of other public agencies shall receive fifty dollars ($50) for each full day of attending meetings of the advisory group.

(f) The advisory group may:

(1) Accept grants, contributions, and appropriations;

(2) Create a staff as it deems necessary;

(3) Contract for any professional services if such work or services cannot satisfactorily be performed by its employees;

(4) Be sued and sue to obtain any remedy to restrain violations of this title. Upon request of the advisory group, the State Attorney General shall provide necessary legal representation.

(5) Take any action it deems reasonable and necessary to carry out the provisions of this title.

(g) The advisory group and all members of the advisory group shall comply with the provisions of Sections 87100 through 87312 inclusive, of Title 9 of the California Government Code.

(h) Any person who violates any provision of this section shall be subject to a fine of not more than ten thousand dollars ($10,000), and shall be prohibited from serving on the advisory group.

67508. (a) The Governor shall annually publish, publicize, and release to the news media and to the appropriate officials of affected communities the entire evacuation plans specified in

the licensing of each nuclear fission power plant. Copies of such plans shall be made available to the public upon request, at no more than the cost of reproduction.

(b) The Governor shall propose procedures for annual review by state and local officials of established evacuation plans, with regard for, but not limited to such factors as changes in traffic patterns, population densities, and new construction of schools, hospitals, industrial facilities, and the like. Opportunity for full public participation in such reviews shall be provided.

Sec. 2. There is hereby appropriated from the General Fund in the State Treasury to the legislative advisory group created by Section 67507 of the Government Code the sum of eight hundred thousand dollars ($800,000) for expenditures necessary in carrying out the responsibilities and duties set forth in Section 67507 of the Government Code.

Sec. 3. Amendments to this measure shall be made only by a two-thirds affirmative vote of each house of the Legislature, and may be made only to achieve the objectives of this measure.

Sec. 4. If any provision of this measure or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the measure which can be given effect without the invalid provision or application, and to this end the provisions of this measure are severable.

[Reprinted from Excerpt of Record at 217-21, *Pacific Legal Foundation v. State Energy Resources Conservation & Development Commission*, Nos. 79-3365, 79-3382, 659 F.2d 903 (9th Cir. 1981)]

Opposition

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No. 81-1944
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

PACIFIC LEGAL FOUNDATION, *et al.*,
Petitioners,

vs.

STATE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION, *et al.*,
Respondents.

PACIFIC GAS AND ELECTRIC COMPANY and SOUTHERN CALIFORNIA EDISON COMPANY,
Petitioners,

vs.

STATE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION, *et al.*,
Respondents.

Consolidated Response to Petitions for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RALPH CAVANAGH
Natural Resources Defense Council, Inc.
25 Kearny Street
San Francisco, CA 94108
Counsel for Respondents-Intervenors

LAURENCE H. TRIBE
Counsel of Record
Chief Appellate Counsel
1525 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4621

ROGER BEERS
KATHRYN BURKETT DICKSON
Special Counsel
380 Hayes Street, Suite One
San Francisco, CA 94102

WILLIAM M. CHAMBERLAIN
General Counsel

DIAN GRUENEICH
Deputy General Counsel
California Energy Resources Conservation and Development Commission
1111 Howe Avenue
Sacramento, CA 95825
Counsel for Respondents

QUESTIONS PRESENTED

1. Did the Ninth Circuit err in holding that a nuclear engineer, who allegedly lost his job when his employer cancelled a power plant project, was not entitled to summary judgment on the issue of his standing to challenge the validity of a state law, where (a) factual disputes existed as to whether the challenged law caused the project's cancellation, and (b) the engineer failed even to allege that invalidation of the law would likely redress his loss of employment?

2. Did the Ninth Circuit err in treating as unripe for adjudication two utilities' omnibus preemption challenges to state statutes that had not yet been authoritatively interpreted or finally applied to any utility's nuclear project, where the plaintiff utilities' claims of present injury were based exclusively on their fears about how the provisions might be interpreted and applied in the future?

3. Did the Ninth Circuit err in holding that two California statutes which address California's need for a reliable, economical, and environmentally acceptable supply of electrical energy, do so without intruding into federally preempted areas of radiation hazard control or obstructing any congressional objective regarding nuclear power?

4. Does any of these questions pose an issue of sufficient legal or factual significance to warrant current resolution by this Court?

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No. 81-1944
No. 81-1945

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

PACIFIC LEGAL FOUNDATION, *et al.*,
Petitioners,
vs.
STATE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION, *et al.*,
Respondents.

PACIFIC GAS and ELECTRIC COMPANY and SOUTHERN CALIFORNIA EDISON COMPANY,
Petitioners,
vs.
STATE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION, *et al.*,
Respondents.

Consolidated Response to Petitions for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JURISDICTION

Of the seven petitioners filing papers with this Court herein, four were not even "parties to the proceedings in the court whose judgment is sought to be reviewed" (Sup. Ct. R. 19.6), and accordingly cannot seek certiorari under 28 U.S.C. § 1254(1) to review the Ninth Circuit's decision.[1] *See* R. STERN & E. GRESSMAN, SUPREME

[1] The petitioners listed in No. 81-1945 are Pacific Gas & Electric Company and Southern California Edison Company. Four of the

COURT PRACTICE 54–55 (5th ed. 1978); *cf. United States v. Nixon*, 418 U.S. 683, 690–92 (1974). Thus, only the petitions of Robert C. Thornberry in No. 81-1944 (*"PLF"*), and of Pacific Gas & Electric Company and Southern California Edison Company in No. 81-1945 (*"PG&E"*), are properly before this Court.[2]

STATEMENT OF THE CASE

Proceedings Below

Respondents, State Energy Resources Conservation and Development Commission, *et al.*,[3] oppose the petitions for certiorari in *PLF* and *PG&E* to review the Ninth Circuit's reversal of two federal district court judgments, consolidated on appeal in the court below. These judgments struck down, as preempted, key aspects of California's system for regulating the commercial generation of electricity for its people by state-regulated utilities.

In *PLF* the federal district court for the Southern District of California had summarily voided Cal. Pub. Res.

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petitioners listed in No. 81-1944—Pacific Legal Foundation, the San Diego Coalition, the San Diego Section of the American Nuclear Society, and the San Diego County Building and Construction Trades Council—were all denied summary judgment by the trial court on standing grounds. *PLF* Pet. App. at 6. On November 1, 1979, the Ninth Circuit properly "dismissed [their] cross-appeal [on the standing issue] on the ground that it was not taken from a final judgment." *PG&E* Pet. App. (hereinafter "App.") at 8 n.11. These parties did not attempt to renew their standing claims in connection with petitioner Robert C. Thornberry's defense below of his favorable district court judgment. Nor do the questions presented in either petition even purport to bring their standing claims before this Court.

[2] Respondents file this single brief in opposition to both petitions.

[3] The respondents, hereinafter collectively referred to as "the Energy Commission," are listed in *PG&E* Pet. at ii.

Code § 25524.2 ("the waste disposal law"), by which California proposed to delay further state certification of nuclear power plants pending federal resolution of the nuclear waste disposal problem—a problem that could, if unresolved, doom such plants to future interruption or abandonment at federal insistence.[4] In *PG&E* the federal district court for the Eastern District of California had invalidated the waste disposal law and 16 other provisions of the Warren-Alquist State Energy Resources Conservation and Development Act ("the Warren-Alquist Act"), Cal. Pub. Res. Code §§ 25500–25986, California's comprehensive legislative scheme for regulating electric power supply.[5] Both courts held that the challenged statutes were preempted by the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2011 *et seq.*, on the ground that the laws invaded a sphere of exclusive federal regulatory authority under the 1954 Act, and frustrated federal objectives with respect to nuclear power.

The Ninth Circuit reversed, rejecting these preemption holdings after ruling (1) that the district court in *PLF* had erred in awarding summary judgment to plaintiff Thornberry without conducting a trial on his standing; and (2) that the district court in *PG&E* had erred in treating as ripe for adjudication, even at the behest of parties with standing, the host of anticipatory

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[4] *Pacific Legal Foundation, et al. v. State Energy Resources Conservation and Development Commission, et al.*, 472 F.Supp. 191 (S.D. Cal. 1979), reprinted in *PLF* Pet. App. at 1–18.

[5] *Pacific Gas & Electric Co., et al. v. State Energy Resources Conservation and Development Commission, et. al.*, 489 F.Supp. 699 (E.D. Cal. 1980), reprinted in App. at 55–64. Hereinafter, all references to the provisions of the Warren-Alquist Act are to section numbers in the California Public Resources Code.

preemption challenges made by the utility plaintiffs. The Ninth Circuit held that only two of the 17 provisions challenged by those plaintiffs were ripe for review—the waste disposal law and Section 25503 of the Warren-Alquist Act, requiring a utility to include at least three alternative sites in its application for any proposed power plant ("the three-site requirement"). App. at 19–27.[6] The court concluded that neither was preempted by the Atomic Energy Act of 1954 because both were "enacted for purposes other than protection against radiation hazards" (*id.* at 2), and "do not impede congressional goals" (*id.* at 46).

The Atomic Energy Act of 1954 and the Challenged Statutes

The basic allocation of state and federal authority to regulate the commercial use of nuclear power was established by the Atomic Energy Act of 1954. That legislation allowed industry for the first time to participate in the development of nuclear power, authorizing private firms to take possession of nuclear materials and to build commercial reactors under licenses from the Atomic Energy Commission.[7] At the same time, Section 271 of the 1954 Act expressly preserved broad state authority over these facilities:

> "Nothing in this chapter shall be construed to affect the authority or regulations of any Federal, State, or

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[6] The court noted that its conclusion regarding the validity of Section 25503 "necessarily affect[ed]" Sections 25504 and 25516, as well, since they also contained requirements relating to three sites. App. at 23 n.22.

[7] The Atomic Energy Commission ("AEC") was dismantled by Section 104 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5814, and its promotional functions were transferred to the Energy Research and Development Administration. *Id.* The AEC's regulatory functions were transferred to the Nuclear Regulatory Commission ("NRC"). *Id.* § 5841.

> local agency with respect to the generation, sale, or transmission of electric power produced through the use of nuclear facilities licensed by the [Nuclear Regulatory] Commission." 42 U.S.C. § 2018.

In 1959, Congress made clear that any preemption of state authority was limited to regulation of "radiation hazards," when it added Section 274 to the 1954 Act. 42 U.S.C. § 2021. That provision establishes a procedure (in sub-section (b)) for delegating certain of the NRC's radiation protection responsibilities to the States. While sub-section (c) of Section 274 prevents the NRC from transferring to the States its *radiation protection* authority with respect to the construction and operation of any nuclear power plant, sub-section (k) contains an express disclaimer of any intent to preempt state authority *beyond* the regulation of radiation hazards:

> "Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards." 42 U.S.C. § 2021(k).

Moreover, Congress has specifically authorized state regulation even of radiation hazards in the contexts of air pollution control and nuclear power plant emergency planning.[8]

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[8] Under Section 122 of the Clean Air Act Amendments of 1977—relied on by the Ninth Circuit (App. at 33 n.28, 44), but nowhere mentioned by any petitioner—Congress permitted the States to regulate radioactive air emissions from nuclear power plants for the purpose of protection against radiation hazards, authorizing state and local government to adopt and enforce radioactive emission or ambient air standards more stringent than those imposed by the federal government. 42 U.S.C. §§ 7416, 7422. Under Section 108(f) of the NRC Authorization Act for Fiscal Year 1980, 96th Cong., 2d Sess. (1980), Pub. L. No. 96-295, 94 Stat. 783 (1980) (relating to nuclear power plant emergency planning), Congress specifically approved "the states' authority to set nuclear power plant siting and land use requirements more stringent than those of the NRC," as the Ninth Circuit observed. App. at 45. Nowhere do petitioners discuss this legislation either.

Based on its review of these enactments, the Ninth Circuit determined—consistent with the rulings of other circuits (*see* page 21 *infra*),—that Congress has expressly confined the preemptive force of the Atomic Energy Act of 1954 to certain forms of "state regulation of radiation hazards associated with nuclear power." App. at 33. The States remain free under the 1954 Act to approve or disapprove proposed nuclear power plants—as they may approve or disapprove proposed power plants utilizing other energy sources—from the standpoints of cost, reliability, land-use, resource-allocation, and other vital state policies. App. at 43.[9]

The provisions of state law challenged by petitioners are part of a comprehensive energy planning and facility siting statute intended to serve these state interests. Thus, California's Warren-Alquist Act requires that any utility proposing to build a power plant in the state, whether nuclear or non-nuclear, submit data dealing with a large number of subjects concerning the proposal.[10] The Energy Commission is required to make

[9] The Ninth Circuit acknowledged, of course, that "[s]tate regulations which directly conflict with regulations of the NRC would . . . be preempted even if they were enacted for purposes other than protection against radiation hazards." App. at 33 n.29. This case plainly presents no such conflict. *See* page 23–27 *infra*.

[10] The provisions challenged by the utility petitioners require that a utility obtain the Energy Commission's "certification" of any energy facility prior to commencing construction (§§ 25500, 25517), and they establish a two-stage licensing process for this purpose. The process begins with the utility's submission of a "Notice of Intention" ("NOI") to build a power plant (§ 25502). In the NOI phase, which lasts a year, the Commission examines the need for additional energy facilities and the relative merit of particular sites and technologies. The provisions challenged by petitioners specify the general contents of the NOI to be submitted by the utility (§ 25504), and authorize the Commission to seek certain additional information (§ 25511). Other provisions merely specify the format or findings required in the Commission's initial hearing order (§ 25512), final report (§ 25514), and approval of the NOI (§ 25516).

various determinations based on this data—including, for example, whether the supply project conforms to the Commission's long-range demand forecast (§§ 25523(f), 25524). As the Ninth Circuit correctly observed, "we have no way of knowing . . . to what purposes the information might be put . . . whether the Energy Commission will ever deny certification, or whether such a denial might be based upon impermissible reasons." App. at 20–21. For present purposes, what may be most significant is the statute's specific directive—not mentioned by petitioners and not yet construed by any state court—that "[i]n no event shall the [Energy] Commission make any finding in conflict with applicable federal law or regulation" (§ 25525).[11]

Of the two provisions in the Warren-Alquist Act held ripe for review by the Ninth Circuit, one requires that information be submitted on three alternative sites for any proposed power plant (§ 25503). This three-site law "applies to all power plants, nuclear and non-nuclear." App. at 41. Its purpose is not only to provide the Energy

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If the NOI is approved, the utility may then file an "Application for Certification" ("AFC "), which commences an eighteen-month proceeding to determine whether a permit should be issued for the actual construction of the facility on a particular site (§ 25519). In the AFC phase, the provisions challenged by petitioners simply require that certain information be included in the AFC and that the AFC be distributed to various agencies (§§ 25519, 25520). They also require that the Commission's decision on the AFC include certain findings (§ 25523), and that the Commission establish a "monitoring system" to ensure compliance with its decisions (§ 25532).

[11] Other provisions of the Warren-Alquist Act mandate all appropriate deference to relevant federal law as well. *See, e.g.*, § 25500 (certification authority vested in Energy Commission "to the extent permitted by federal law"); § 25528 (Energy Commission required to assure that areas surrounding a proposed plant will not subsequently exceed population densities specified by the NRC and by applicable state land-use planning requirements).

Commission with "an efficient means of deciding where a proposed power plant should be located" (*id.*), but also to allow the "banking" of other acceptable sites in order to expedite future siting proceedings. It is obviously "unrelated to protection against radiation hazards." *Id.* at 40–41.

Nor does the other provision held ripe for review by the Ninth Circuit—the waste disposal law—purport to regulate radiation hazards. As the Ninth Circuit observed, the waste-disposal law is *not* directed at *where, how safely,* or *by what methods,* any power plant's radioactive wastes are to be disposed of—and, *a fortiori,* is not a "regulation" of any radiation hazards associated with such waste disposal. Rather, the waste disposal law reflects California's concern that federal authorities might order the shutdown of nuclear plants generating such wastes, if a method of waste disposal is not approved by the federal government on a timely basis.[12] As the Ninth Circuit stated:

> "Until a method of waste disposal is approved by the federal government, California has reason to believe that uncertainties in the nuclear fuel cycle make nuclear power an uneconomical and uncertain source

[12] Although the expected useful operating life of a nuclear power reactor is approximately 30–40 years, the storage capacity on-site for the wastes generated by the reactor is typically limited to 5–10 years accumulation. Thus, off-site storage for such wastes—at a federally approved repository—must be made available after that time in order to keep reactors operating. Bridenbaugh Declaration ¶ 30 [Excerpts of Record on appeal (hereinafter "ER") at 257]. *See also, Washington Post,* April 27, 1982 at 17 ("As [s]pent fuel from the 74 nuclear power plants around the country . . . pil[es] up in temporary storage sites," some of the plants might "be forced to close."). For instance, Virginia Electric Power Company officials project that unless federal waste policies are resolved, the utility may have to shut down its nuclear plant, because it will run out of storage space for its used-up fuel. *Id.*

> of energy. The legislature has chosen to mandate reliance upon other energy sources until these uncertainties associated with nuclear power are resolved." App. at 40.

Thus, the waste disposal law is concerned solely with the existence of a federally approved waste disposal method, "not with the adequacy of the method." App. at 40.[13]

Petitioners' Omnibus Preemption Challenge

Neither of the two laws sustained below, nor any others challenged in the district courts, has *ever* been applied to deny or condition certification of a nuclear plant proposed by the util , petitioners or by anyone else, much less been given any authoritative construction by a state court. The utilities assert that all their claims are ripe because they challenge "the *very existence* of the California certification system and other statutes. . . ."

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[13] California itself is not a probable target for ultimate disposal of high-level nuclear wastes; the State seems "never [to have] been proposed as the site for a permanent high-level radioactive waste disposal facility." Lash Affidavit ¶ 11 [ER at 315].

The utility petitioners assert that the waste disposal law requires the Energy Commission to make "an *independent* determination whether a satisfactory technology or means for the disposal of high-level nuclear waste *exists in fact*." (*PG&E* Pet. at 18 (emphasis in original)), implying that the Commission must necessarily second-guess the safety of the technology eventually approved by the federal government. But section 25524.2 does not, on its face, require any such thing. Rather it merely requires a determination that "there exists a demonstrated technology or means for the disposal of high-level nuclear waste," and the statute makes clear in subsection (c) that this does not mean that actual "facilities for the application of such technology and/or means be available" at the time this determination is made. As the statute itself explains, the State must be assured "that the United States through its authorized agency has approved" this technology. Finally, it was obviously necessary in Section 25524.2 to vest some state agency—in this case, the Energy Commission —with authority to determine whether all of these conditions for reactor licensing had been met.

PG&E Pet. at 26 (emphasis in original). The Ninth Circuit's response was straightforward: "[a] case or controversy is not presented simply because a party is subject to a general regulatory process which, when applied to the specific facts developed in some future administrative proceeding, *might* cause a state agency to take a particular action which some court *might* thereafter determine to be unconstitutional." App. at 22. (citation omitted).

Petitioner Thornberry, who has not even alleged a *risk* of state action directed against him, seeks to assert derivatively the third-party rights of the regulated utilities—and claims both standing to enforce such rights and the ripeness of his attempt to do so—on the theory that the Sundesert nuclear project on which he had been employed was cancelled *partly* because of the pendency of the waste disposal law. Given the factual dispute as to whether the project would have been cancelled even without that law,[14] and given that Thornberry had not even "alleged . . . that he might get his job back if the Sundesert project were revived" (App. at 16), the Ninth Circuit held summary judgment in Thornberry's favor on the issue of standing to have been improper. *Id.* at 13.

REASONS FOR DENYING THE WRIT

Several circuit courts of appeals have consistently held that the Atomic Energy Act of 1954 impliedly preempts state regulation of radiological hazards but that Congress has expressly declined to preempt other

[14] The Ninth Circuit noted there was evidence in the record from which a trier of fact could infer that the Sundesert project was financially infeasible. App. at 11–13.

forms of state regulation of electric power generation by nuclear plants. *Northern States Power Co. v. Minnesota,* 447 F.2d 1143, 1150 (8th Cir. 1971), *aff'd mem.,* 405 U.S. 1035 (1972); *Silkwood v. Kerr-McGee Corp.,* 667 F.2d 908, 920 (10th Cir. 1981); *Illinois v. Kerr-McGee Chemical Corp.,* Nos. 81-1110, 81-1152 (7th Cir., May 4, 1982). The Ninth Circuit's decision is well within this consensus as to the scope of federal preemption under the Atomic Energy Act. Petitioners' dissatisfaction with the result reached by the Ninth Circuit in applying these clear rules is not accompanied by any demonstration of conflict with the decisions of another circuit or of this Court that would justify granting a writ of certiorari.

Certainly, the "across-the-board" character of the challenged statutes (*PLF* Pet. at 14) does not lend any national significance to the Ninth Circuit's otherwise unremarkable decision. The State's undeniable ability to refuse to license proposed nuclear plants, one by one, as inconsistent with the State's power needs, its environmental concerns apart from radiation hazards, or its cost-benefit assessments of alternative means of generating power (*PG&E* Pet. at 16–17) renders protests about "across-the-board" regulation simply a quarrel with the State's chosen mechanism for producing an indisputably lawful result.

Federal judicial action to deprive a State of the option to proceed with caution in licensing new nuclear plants for commercial power generation on the record in this case would require *both* an unprecedented disregard of Article III limits on federal court intervention *and* an override of Congress's explicit allocation of authority between the NRC and the States with respect to nuclear power regulation. The Ninth Circuit, in declining peti-

tioners' invitation to take these two steps—steps that would swell federal judicial power at the expense of both Congress and the States—has vindicated well-settled and important principles of federalism and of the separation of powers, but has provided no occasion for plenary review by this Court.

I. THE NINTH CIRCUIT WAS CLEARLY CORRECT IN HOLDING THAT PETITIONER THORNBERRY WAS NOT ENTITLED TO SUMMARY JUDGMENT ON THE QUESTION OF STANDING.

On motion for summary judgment below, petitioner Thornberry claimed standing on the grounds that (1) the waste-disposal law caused SDG&E, his employer (but not a party below), to cancel the Sundesert nuclear power plant project on which he had been employed as a nuclear engineer, and (2) the cancellation of the Sundesert project caused Thornberry to lose his job. App. at 11. The Ninth Circuit noted that the Energy Commission disputed both of these premises (*id.*), and concluded that these material questions of fact as to "causation" should have precluded a grant of standing to Thornberry on summary judgment.[15] *Id.* at 13. The Ninth Circuit further noted that Thornberry had not demonstrated any likelihood that Sundesert would proceed if the nuclear waste disposal law was invalidated,

[15] Observing that it could "affirm a grant of summary judgment only if the material facts are undisputed and the moving party is entitled to judgment as a matter of law" (App. at 11), and that it was required to "view all evidence and factual inferences in the light most favorable to the non-moving party, the Energy Commission" (*id.*), the Ninth Circuit noted the "material questions" of causation raised by the Energy Commission's evidence (1) that the Sundesert project was independently doomed by financial obstacles and (2) that the Sundesert project had been cancelled notwithstanding the pendency of a bill in the California Assembly exempting the project from the waste disposal law. *Id.* at 11–16.

and that Thornberry had "not even alleged, much less proved, that he might get his job back if the Sundesert project were revived" *Id.* at 16. Thus, the Ninth Circuit concluded that "[o]n the record before us, it is a mere speculative possibility that the relief sought would remedy Thornberry's injury." *Id.* at 16. The court held that "[s]ummary judgment on the issue of standing was therefore improper." *Id.* at 13.

In light of this Court's frequent admonition that, as an "irreducible minimum," Article III requires a plaintiff invoking federal judicial power to demonstrate both that his injury "fairly can be traced to the challenged action" and that the injury "is likely to be redressed by a favorable decision" (*Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 102 S.Ct. 752, 758 (1982)), the Ninth Circuit was clearly correct in holding that the district court had erred in granting Thornberry's motion for summary judgment on the standing issue while material issues of fact remained as to causation and redressability.[16] The

[16] The cases cited by petitioner Thornberry (*PLF* Pet. at 16–19) represent no departure from this Court's well-established redressability requirement. In *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 262 (1977), this Court held that a "substantial likelihood" existed that respondent's proposed housing project would proceed if the offending ordinance were invalidated. Similarly, in *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74–75 (1978), the Court found a "substantial likelihood" that invalidation of the Price-Anderson Act would block two nuclear power plants which respondents viewed as a threat to them. And in *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 281 n.14 (1978), this Court ruled that the injury to respondent of being excluded from competition for all 100 places in a medical school class on the basis of his race was "likely to be redressed" by invalidating the special program prescribing his exclusion. *Peterson* v. *City of Greenville, 373 U.S. 244 (1963)*, and *Orr* v. *Orr* 440 U.S. 268 (1979), are altogether inapposite. In *Peterson*, this Court held, *inter alia*, that trespass convictions that had the effect of enforcing a city ordinance mandating racial discrimination

district court's ruling was indeed "gratuitous and thus inconsistent with the Article III limitation." *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 38 (1976).[17]

For these reasons, certiorari must be denied in *PLF.* As discussed below, it must also be denied in *PG&E.*[18]

II. THE UTILITIES' CHALLENGES TO STATE STATUTES THAT MIGHT NEVER BE APPLIED, ADMINISTRATIVE ACTIONS THAT MIGHT NEVER BE TAKEN, AND JUDICIAL DETERMINATIONS THAT MIGHT NEVER BE MADE, DO NOT WARRANT PLENARY REVIEW.

The utility petitioners offer no persuasive reasons for this Court to review now those matters which were held

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were invalid regardless of the motives of the private actor invoking the trespass statute. 373 U.S. at 248. And in *Orr,* the Court refused to bar challenges to underinclusive statutes simply because a state could theoretically thwart any successful plaintiff by rewriting the invalidated law to the plaintiff's disadvantage. 440 U.S. at 272.

[17] The Ninth Circuit also pointedly observed that Thornberry's alleged injury "result[ed] from the independent action of a third party not before the court"—SDG&E, Thornberry's erstwhile employer. App. at 15 n.17. In this respect, Thornberry's suit may be seen as an effort to invoke SDG&E's rights under the Atomic Energy Act, although Thornberry offers no reason to depart from the settled principle that "one party [should ordinarily be denied] standing to assert the legal rights of another" (*Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 80 (1978))—a principle of avoiding "adjudication of rights which those not before the Court may wish to assert, and [of providing] the assurance that the most effective advocate of the rights at issue is present to champion them." *Id.,* citing *Singleton v. Wulff,* 428 U.S. 106, 113–14 (1976) (plurality opinion). For this independent reason, Thornberry was properly denied standing.

[18] Thornberry is clearly not entitled to seek review in this Court of the Ninth Circuit's substantive rulings unless the Ninth Circuit erred in holding that Thornberry had failed to establish his own standing. Thus, it makes no difference that in the wake of the Ninth Circuit's substantive rulings "it would be futile for Robert Thornberry to further attempt to challenge a state law which has already been ruled valid." *PLF* Pet. at 19. Inasmuch as the Ninth Circuit's reversal in *PLF* on the standing issue left *only* the substantive issues in *PG&E* appropriate for review by the Ninth Circuit, Thornberry is in effect claiming the right to seek review of the Ninth Circuit's disposition of a case to which he was not a party.

unripe for federal adjudication by the Ninth Circuit. Indeed, even their challenges to the two provisions which the Ninth Circuit held ripe for such adjudication do not present an appropriate occasion for this Court's plenary review at this time.

A. The Ninth Circuit Was Clearly Correct In Refusing to Award the Utilities the Anticipatory Advisory Opinions They Sought.

Twelve of the 15 provisions of the Warren-Alquist Act which were deemed unripe for review by the court below merely established licensing procedures or information-gathering requirements. The Ninth Circuit was properly unwilling to speculate as "to what purposes the information might be put" in this "certification system," or to guess whether or why a power plant proposed by the utility petitioners might ever be rejected. App. at 20–21. Two other provisions not considered timely for adjudication are no longer being challenged by the utility petitioners.[19] The final unripe provision, dealing with the acquisition of development rights in the vicinity of nuclear power plants, was also one which had not yet been applied or interpreted by the State and might never have to be invoked. Thus the court of appeals concluded that the question of its constitutionality "would be better decided after the statute has been

[19] Section 25524.1(a) predicated California's future reliance on nuclear power plants that require "reprocessing" of fuel upon the establishment of the necessary technology, and Section 25524.3 ordered a study of the feasibility of undergrounding or berm containment of nuclear power plants. The utility petitioners have abandoned any challenge to these provisions in their petition (*PG&E* Pet. at 6 n.5), but maintain their challenge to subsection (b) of Section 25524.1, dealing with the storage capacity for "spent fuel" at the reactor site. The Ninth Circuit correctly held, however, that the challenge to Section 25524.1(b) was not ripe for review "[b]ecause we cannot know whether the Energy Commission will ever find a nuclear plant's storage capacity to be inadequate." App. at 25.

applied." *Id.* at 22.[20]

Because these utilities have never pursued certification of a nuclear project under these laws (*see* notes 21, 25 *infra*), they are reduced to arguing that "the *very existence*" of these statutes causes them judicially cognizable injury. *PG&E* Pet. at 26 (emphasis in original). Thus, in lieu of seeking certification of a power plant from the Energy Commission, petitioners requested an advisory opinion from a federal district court—despite "this Court's oft-repeated admonition that the constitutionality of statutes ought not to be decided except in an actual factual setting that makes such a decision necessary." *Hodel v. Virginia Mining & Reclamation Association,* 452 U.S. 264, 294–95 (1981).

It is for want of any concrete application of the laws challenged below that these petitioners have been compelled to make the myriad, speculative, and broadly framed preemption claims asserted in this case. Accordingly, because petitioners have not awaited—or even sought—the kind of definitive state agency or judicial construction of the statutes which would appear in a decision approving or rejecting a nuclear plant, petition-

[20] This provision of the Warren-Alquist Act, Section 25528, again applies to all kinds of power plants, and in the case of nuclear plants, simply requires an applicant, as a prerequisite for Energy Commission approval, to agree to acquire such rights as may be needed to assure that areas surrounding a proposed plant will not subsequently exceed population densities specified by the NRC itself and by all applicable state land-use planning requirements. The Ninth Circuit noted that the Energy Commission was directed to waive the development-rights acquisition requirement under certain circumstances, and that the statute contemplates that the Energy Commission "will ordinarily follow NRC standards on population density." App. at 22–23. Moreover, state authority to impose such land-use restrictions was clearly confirmed by Congress in the NRC Authorization Act for Fiscal Year 1980, discussed in note 8 *supra*.

ers cannot point to a single instance in which the Energy Commission has regulated radiation hazards.[21] For this reason, petitioners sidestep the unbroken line of judicial precedents limiting the zone of federal preemption in this area to radiation hazard control, and seek to extend that zone across some undefined but unmistakably wider terrain. Ultimately, petitioners' claims could not be considered ripe for review unless one were to accept their radically expansive notion that there is something fundamentally awry in the mere fact that there "coexist two regulatory agencies—one federal and one state"—or in the fact that a public utility can be "required to serve two exacting taskmasters." *PG&E* Pet. at 9, 4–5. Such assertions are simply too naive to merit this Court's plenary attention.[22]

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[21] In the absence of such a final decision, the utilities rely heavily on speculation arising out of a single incident—a dispute between the Commission and PG&E over the contents of the initial application for a power plant known as the Stanislaus Project. *PG&E* Pet. at 22–23. Even if petitioners' characterization of this incident were accepted, this Court has made clear that an agency's treatment of the document which initiates a proceeding—in this case a preliminary license application—cannot be reviewed as a definitive statement of the agency's position on the issues to be decided in the proceeding. *See FTC v. Standard Oil Co.*, 449 U.S. 232, 239–43 (1980). Moreover, in this case the trial court had before it uncontroverted testimony from the Commission's staff, regarding the Commission's legitimate purposes, unrelated to radiation protection, for demanding the information in question. *See* Direct Testimony of Gary Simon, pp. 81–100 (Jan. 7, 1980).

[22] The Ninth Circuit similarly refused to allow the utility petitioners to "establish a justiciable controversy by simply asserting that the risk of future harm causes them a present injury." App. at 22. Beyond the claim that all 15 statutes deemed unripe by the Ninth Circuit stand in the aggregate as an "absolute barrier" to their plans, petitioners make no attempt to show that the supposed hardships of participating in an Energy Commission siting proceeding constitute anything beyond "the expense and annoyance of litigation [which] is 'part of the social burden of living under government.' " *FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980). Nor is there anything in the findings of the trial courts below which made it inappropriate for the Ninth Circuit to examine the differences in the statutes before it to determine

B. Even if the Utilities' Challenges to the Waste Disposal Law and Three-Site Requirement Were Ripe, Plenary Review by This Court of the Validity of Those Statutes Would be Premature.

While the Ninth Circuit held that the utilities' challenges to the waste disposal law and the three-site requirement were *ripe* for adjudication, they are surely *premature* for review *by this Court on certiorari* while there remain major unanswered questions as to how those laws will be interpreted by either the Energy Commission or the State's courts—especially in light of the Warren Alquist Act's repeated injunctions to the Energy Commission to comply with federal law. As this Court has observed, even resolution by this Court of "questions of public importance . . . can await a day when the issue is posed less abstractly" than it plainly is here. *The Montrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) (dismissing certiorari as improvidently granted).

Thus, although the petitioning utilities now complain that the waste disposal law prevents them from planning for nuclear power plants until the Energy Commission has determined that a means of waste disposal exists, over four years ago these same petitioners argued before the Energy Commission that it could even then affirmatively find that the nuclear waste disposal technology required by the waste disposal law already existed.[23] While the Energy Commission has always disagreed with this contention, had petitioners pursued

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which claims "would be illuminated by the development of a better factual record" (App. at 20) and thus should await application by the agency. *Cf. Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 71 (1961).

[23] *See* Petition for Reconsideration in the Matter of Implementation of Nuclear Reprocessing and Waste Disposal Statutes, Docket Nos. 76-NL-1, 3 (1978).

this argument in state court to a favorable conclusion, any question of preemption involving that provision could have been mooted. Even if the Ninth Circuit was correct in ruling that the district court in *PG&E* "did not abuse its discretion in declining to abstain" (App. at 27 n.24), the case for *this* Court's discretionary review is gravely weakened by the absence of any definitive state court ruling on this question of state law. Moreover, there is no reason to assume in advance—as the utilities apparently do (*see PG&E* Pet. at 18–19)—that the Energy Commission or the California Legislature would ever determine that a waste disposal technology does *not* exist if the federal government at some later date finds that one *does*.[24] Similarly, there is no reason to hypothesize, as the utilities do (*see PG&E* Pet. at 20), any conflict between California's requirement of three sites and the NRC's requirement of one—in advance of the actual siting proceedings that would consider particular sites.[25]

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[24] As the Ninth Circuit noted, "[s]uch a possibility need not concern us . . . [since] it will be time to consider any future conflicts if and when they arise." App. at 40 n.35. Indeed, although the Ninth Circuit held the waste disposal law ripe for review, its opinion shows some hesitancy in doing so:

"Section 25524.2 does not have any immediate impact on the utilities; they may continue to submit notices of intention and applications for certification for their proposed nuclear plants, and the Energy Commission must still receive and process the notices and applications even though the required findings have not been made. . . . No plants may be certified until the findings are made, but the utilities concede that their proposed plants are many years from being eligible for certification." App. at 26.

Indeed press accounts of this law have noted that "[n]o particular plant is threatened by the moratorium [under the waste disposal law] since plants under construction are not affected and no new nuclear power plants are planned in California in the foreseeable future." *Nucleonics Week*, April 29, 1982, at 9.

[25] Indeed, there was uncontradicted evidence in the trial court of efforts by the Energy Commission, PG&E, and the NRC to coordinate the siting proceedings of the two agencies in dealing with the Stanislaus project (*see* note 21 *supra*). *See* Hahn Declaration

Inasmuch as the waste disposal law and the three-site requirement have never been construed or applied in any such certification proceedings and have never been reviewed by the California Courts, the Ninth Circuit's substantive assessment of the reach of the Atomic Energy Act of 1954 with respect to those laws is at best premature for plenary review by this Court.[26]

Whatever one's views of the merits, therefore, certiorari should be denied for these reasons.

III. NOTHING IN THE MERITS OF PETITIONERS' OMNIBUS PREEMPTION ATTACK ON CALIFORNIA'S POWER PLANT REGULATIONS WARRANTS THIS COURT'S PLENARY CONSIDERATION

A. The Regulatory Means Chosen by California Herein Were So Plainly Authorized by Congress Itself that Petitioners' Only Proper Recourse Is to That Body Rather than to This Court.

Nothing in either of the petitions filed herein suggests a need for this Court's plenary review of the Ninth Circuit's analysis of the scope of federal preemption under

¶¶ 5–14 [ER at 264–70]. PG&E aborted this coordination effort by filing this suit, although its chief supply planner had written the NRC to say, "I see no procedural conflicts that should occur between the Energy Commission's and the NRC's review processes. . . ." *Id.*, Exh. D [ER at 278]. Moreover, the characterization of the NRC's procedures as requiring only one site may itself be an exaggeration given NRC regulations calling for information from applicants relating to "alternatives to the proposed action." *See* 10 C.F.R. §§ 51.20–51.26.

[26] Although respondents argued below that neither of these two laws was ripe for review, they have not cross-petitioned from the Ninth Circuit's contrary ripeness holding, believing that no issue worthy of certiorari is presented by that holding in light of the Ninth Circuit's favorable ruling on the merits. Respondents acknowledge, however, that lack of ripeness, rather than absence of an implied cause of action for private enforcement, was the bar to the utilities' invocation of the Atomic Energy Act of 1954. For the utilities relied on the Atomic Energy Act of 1954 and the Supremacy Clause only defensively, *cf. McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819), rather than "claiming enforcement rights under the [1954] Act." App. at 52 (Ferguson, J., concurring). That California has yet to move against these utilities may make such reliance premature, but it does not transgress limits on inference of positive causes of action.

the Atomic Energy Act of 1954, or of the propriety of the state authority exercised in the waste disposal law and in the three-site requirement. Indeed, despite petitioners' exertions to make this case appear otherwise, the instant dispute is not truly between California and Congress, but rather between the State and certain of its own regulated electric utilities. Those utilities evidently wish to make their own determinations as to electricity supply in the case of nuclear power plants, without the usual accountability to the State that licenses these utilities to meet its power needs. As the Ninth Circuit carefully explained, however, Congress has amply authorized the States to make just the sorts of decisions upheld below under Sections 271 and 274(k) of the Atomic Energy Act of 1954,[27] and, indeed, has authorized the States to make decisions regarding control of radiation hazards under the Clean Air Act Amendments of 1977 and the NRC Authorization Act for Fiscal Year 1980. *See* App. at 29–33, 44–45; *see also* note 8 *supra*.

Nor does the decision below conflict with any ruling

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[27] The utilities' assertion that Section 271 protects a State's authority over such electric power only "*after* it is generated" (*PG&E* Pet. at 14 n.11, emphasis in original) is plainly contradicted by Section 271's express reservation of state authority over electric power "generation" as such, and finds no support in any decision of this Court or any other. Likewise the utilities' assertion that Section 274(c) was "intended to preserve the *exclusivity* of the NRC's jurisdiction" in areas *beyond* radiation hazards (*PG&E* Pet. at 17 (emphasis in original)) ignores the fact that Section 274 by its terms deals *only* with the regulation of "radiation hazards." Moreover, "[t]he only logically acceptable reason for inclusion of subsection (k) . . . was to make it clear that Congress was not, by subsection (c) of the 1959 amendment, in any way further limiting the power of the states to regulate activities, *other than radiation hazards*, associated with those areas over which the AEC was forbidden by that subsection to relinquish its control." *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1150 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972) (emphasis in original).

of this Court or of any other circuit. While the utility petitioners attempt to conjure up a conflict between the Ninth Circuit's decision and that of the Eighth Circuit in *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972) (*see PG&E* Pet. at 10), in fact the Ninth Circuit expressly followed the decision in *Northern States*. App. at 35. As the Seventh Circuit recently stated in *Illinois v. Kerr-McGee Chemical Corp.*, Nos. 81-1110, 81-1152, Slip Op. at 17 (7th Cir., May 4, 1982), "the Ninth Circuit agreed with the Eighth Circuit in *Northern States* that Congress intended the Atomic Energy Act to preempt state regulation of radiation hazards." [28]

The utility petitioners' claims of preemption under the Atomic Energy Act are ultimately premised not on

[28] Even petitioner Thornberry agrees with this proposition (*PLF* Pet. at 7), although he purports to discern in the Ninth Circuit's review of the legislative history of the waste disposal law a violation of this Court's decision in *Perez v. Campbell*, 402 U.S. 637, 651–52 (1971). Thornberry would have preferred that the Ninth Circuit give less credence to that law's actual history in determining its purposes. *PLF* Pet. at 11. In his view, the Ninth Circuit should have divined those purposes from an analysis of the text of another measure, Proposition 15, which was in fact defeated (*id.* at 10)—despite this Court's observation that "unsuccessful attempts at legislation are not the best of guides to legislative intent." *Red Lion Broadcasting Co. v. Federal Communications Comm'n*, 295 U.S. 367, 381 n.11 (1969). Nothing in *Perez* requires that this bizarre mode of statutory construction be utilized in a preemption case. Rather, the Court there determined that the state law obstructed a federal objective and then held that it was immaterial whether the State's purpose was to obstruct the purpose of the federal law or not. If the Atomic Energy Act in fact contained a federal pro-nuclear mandate, intended to override all state objections based on need, cost, or reliability, then *Perez* might indeed make the State's purposes in regulating nuclear facilities irrelevant. But the Atomic Energy Act manifestly contains no such mandate (*see* note 30 *infra*), and *Perez* surely does not require that the State's purposes of regulation be ignored when Congress has expressly chosen such purposes in Section 274(k) as the dividing line between preempted and non-preempted regulation.

any plausible interpretation of the 1954 Act, but on these petitioners' extravagant notions of what "preemption" is all about. Thus, while refusing to acknowledge the *express limitations* on preemption stated in the Atomic Energy Act itself, the utilities appear to believe that the mere overlap in the subject matters of regulation between federal and state authorities somehow requires the ouster of all state authority across this wide realm. *See, e.g., PG&E* Pet. at 4, 21. The Ninth Circuit correctly rejected this unprecedented approach, and conducted instead a careful and detailed assessment of the particular interests and objectives underlying the federal and state enactments at issue, in an effort to "reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.'" *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. 117, 127 (1973), quoting *Silver v. New York Stock Exchange,* 373 U.S. 341, 357 (1963). *See* App. at 37–46.

When thus understood, petitioners' claims merit no further judicial review. If these utilities seek relief from the specific forms of state regulation upheld below, they should be petitioning Congress and not this Court.

B. The Ninth Circuit's Decision Does Not Portend Any Nationwide Impact of a Sort Which Might Merit Review on Certiorari.

It goes without saying that the decision below—upholding two aspects of California's system for regulating its electric utility companies—is of moment to California and the utilities it regulates. But the utilities' assertion that this decision will "sound the death knell" for nuclear power in California (*PG&E* Pet. at 9) and petitioner Thornberry's purported concern about "the possibility that it will be applied on a national basis" (*PLF* Pet. at 14), could be taken seriously only if the

basic tenets of the Atomic Energy Act of 1954 were systematically ignored.

Congress never contemplated that the Atomic Energy Act of 1954 would deprive States of their right to determine whether (and to what extent) their energy needs should be met by nuclear power or by some other energy technology.[29] Indeed, the preservation of this traditional sphere of state authority was the manifest aim of Congress in including Sections 271 and 274(k) in the Act. 42 U.S.C. §§ 2018, 2021(k).[30] Moreover, Con-

[29] Even the utilities concede state "authority or responsibility to make decisions concerning the need for additional electric power generating capacity, the absolute or relative cost acceptability of a nuclear plant, electric power ratemaking, . . . [and] the sale or transmission of electric power produced by nuclear facilities." *PG&E* Pet. at 16–17. Of course, this kind of authority can be exercised most directly by any State choosing to perform itself all of the functions of an electric utility and to exercise all of the management prerogatives for planning and building new generating capacity. *Cf.* N.Y. Pub. Auth. Law § 1005 (establishing public power authority). Petitioners do not deny that any State could make such a choice and could thereupon limit, for any reason of state energy policy, the amount of public resources invested in nuclear power plants. On the other hand, the fact that the State's electrical energy supply is provided by state chartered utilities rather than a state agency obviously does not in itself evoke any limitation in the Atomic Energy Act upon the State's authority to direct choices of sites or selections among energy technologies.

[30] These provisions in themselves preclude any inference of "an intent to promote nuclear power at all costs" (App. at 42) merely from the broad statements of policy contained in the 1954 Act. Thus, notwithstanding Congress's intention in 1954 to encourage private industry to enter the nuclear field (*e.g.*, 42 U.S.C. § 2013(d)) or to direct the development of nuclear power "so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free enterprise" (*id.* § 2011), this Court only this term has refused to find federal preemption of state energy legislation merely on the basis of "general statements" of encouragement of an energy source in federal legislation. *Commonwealth Edison Co. v. Montana,* 101 S.Ct. 2946, 2962 (1981). The Court held that such general statements—in that case dealing with another energy source, coal—do not "demonstrate a congressional intent to preempt all state legislation that may have an adverse impact on the use of coal." *Id.*

gress has made clear in subsequent enactments that there is no national objective which favors the development and deployment of nuclear energy as a source of commercial electricity at the expense of any other considerations in a State's energy or environmental policy.[31] In light of the Clean Air Act Amendments of 1977, 42 U.S.C. §§ 7416, 7422, and the NRC Authorization Act for Fiscal Year 1980 (*see* note 8 supra), the actions California has taken here pale beside those a State could plainly take with Congress's blessing under these laws—even to the point of "keep[ing] nuclear plants from being built." App. at 43.

Given the many alternative means available to any State to restrict its reliance on nuclear power, petitioners' arguments gain nothing from the fact that more than one State has taken, or might choose to take, certain regulatory steps regarding nuclear power,[32] or that other States might choose to regulate in an "across-the-

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[31] *See* Energy Reorganization Act, 42 U.S.C. §§ 5801, 5812 (1974); Department of Energy Reorganization Act, 42 U.S.C. § 7112 (1977). In *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117 (1978), although the Court found a degree of tension between a state statute and "the central policy of the Sherman Act—our 'charter of economic liberty'," it sustained the state law, reasoning that "if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed." *Id.* at 133. Just so, if a supposed congressional objective to promote the commercial deployment of nuclear power were given the preemptive effect urged by the utilities, the State's authority to engage in electrical energy regulation would be effectively destroyed.

[32] Contrary to the insinuation of petitioner Thornberry (*PLF* Pet. at 21), it was the district courts' egregious intrusions into areas of traditional state regulatory authority that accounted for the filing of over 20 state *amicus* briefs supporting California's position in the Ninth Circuit, and not "the potential of the ruling [California sought] to open the door to widespread obstruction" of nuclear power use. *Id.*

board" manner (*see PLF* Pet. at 14) rather than employing an *ad hoc* approach. In sum, the decision below merely reaffirms authority that the States have long possessed.

C. Nor Is Certiorari Warranted to Consider Hypothetical "Conflicts" Which Petitioners Adduce From the Inaction of the NRC.

Petitioners contend that preemptive force is to be given the NRC's determinations not to require more than one site in reactor license applications and not to suspend reactor licensing nationwide pending approval of a waste disposal technology. *PG&E* Pet. at 18–20; *PLF* Pet. at 13. Such contentions impermissibly equate (a) a federal policy not to attach certain conditions *nationally* to the commercial use of nuclear power by state-regulated utilities, with (b) a congressional determination that individual states may not *themselves* attach those conditions *locally* as a matter of state regulatory policy. *See New York Telephone Co. v. New York Labor Department,* 440 U.S. 519, 544–45 (1979) (opinion of Stevens, J., joined by White & Rehnquist, JJ.); *DeCanas v. Bica,* 424 U.S. 351, 360–61 (1976); *Kewanee Oil Co. v. Bicron Corp.,* 416 U.S. 470, 493 (1974).[33]

The NRC's mandate is to assure the safe operation of nuclear power plants from a radiation standpoint. *See, e.g., New Hampshire v. Atomic Energy Commission,* 406 F.2d 170 (1st Cir.), *cert. denied,* 395 U.S. 962 (1969). That the NRC can discharge this radiation protection responsibility without comparing several proposed sites for

[33] Petitioner Thornberry's reliance in this regard on *Ray v. ARCO,* 435 U.S. 151 (1978) (*PLF* Pet. at 13, 14) is transparently misplaced. As the Court there made clear, the fact that a facility is in compliance with federal law "does not mean that it is free to ignore otherwise valid state or federal rules or regulations." *Id.* at 168.

each nuclear plant from a land-use perspective explains why the NRC would require that an applicant provide only one acceptable site rather than the three demanded by California. Only a triumph of arithmetic over analysis could lead anyone to find proof of federal preemption in that disparity of numbers. Similarly, the NRC may continue to license nuclear plants prior to the development of a waste disposal technology in the belief that its safety mandate may be satisfied by the later shutdown of nuclear power plants if such disposal technology cannot be found in time. But the continued licensing of nuclear power plants in these circumstances is not necessarily consistent with a *State's* mandate to assure a dependable and efficient supply of electricity to its people—*precisely because* plant shutdowns might later have to be ordered by the NRC to fulfill its mandate. *See* note 12 *supra.*

Thus, no "conflict" whatever exists between the state statutes challenged here and any federal policy implemented by the NRC.

CONCLUSION

Despite its manifest importance to the State of California, the judgment below follows a wholly familiar legal path and breaks no new ground either as to the law of standing and ripeness or as to the preemptive reach of the Atomic Energy Act of 1954. Only by disregarding Congress's clear intent in Sections 271 and 274(k) could petitioners argue that the several States should be denied their long-standing authority to refuse to certify any given nuclear power plant because it is too costly, is not needed, or would be unreliable as a source of electricity. Unable to make *that* argument, petitioners inconsistently challenge either the very co-existence of

state and federal regulation dealing with electrical power generation by nuclear plants (*PG&E* Pet. at 9), or California's preference for making some aspects of its licensing determinations on a *generic* rather than *ad hoc* basis. *PLF* Pet. at 14. Although preserving that decision-making structure matters greatly to California as a sovereign State, doing so has no effect on anything Congress has decreed in the Atomic Energy Act of 1954. The Ninth Circuit's straightforward refusal to dismantle California's structure—especially in the setting of this largely hypothetical and wholly anticipatory attack on how the structure might someday be used—was too plainly mandated both by what Congress has expressly said, and by what courts have uniformly held, to warrant further

consideration by an already burdened Court. The petitions for certiorari should accordingly be denied.

Respectfully submitted,

LAURENCE H. TRIBE
Counsel of Record
Chief Appellate Counsel
1525 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4621

ROGER BEERS
KATHRYN BURKETT DICKSON
Special Counsel
380 Hayes Street, Suite One
San Francisco, CA 94102

WILLIAM M. CHAMBERLAIN
General Counsel
DIAN GRUENEICH
Deputy General Counsel
California Energy Resources
Conservation and
Development Commission
1111 Howe Avenue
Sacramento, CA 95825

Counsel for Respondents *

RALPH CAVANAGH
Natural Resources Defense
Council, Inc.
25 Kearny Street
San Francisco, CA 94108
Counsel for Respondents-Intervenors

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Petitioner's Reply Brief

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IN THE

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OCTOBER TERM, 1981

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v.

STATE ENERGY RESOURCES CONSERVATION & DEVELOPMENT COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

PETITIONERS' REPLY BRIEF

RONALD A. ZUMBRUN
ROBIN L. RIVETT
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154

RAYMOND M. MOMBOISSE
Counsel of Record

SAM KAZMAN
Pacific Legal Foundation
1990 M Street, N.W., Suite 550
Washington, D.C. 20036
Telephone: (202) 466-2686

Attorneys for Petitioners

PANDICK PRESS, WASHINGTON—1901 N. OAK STREET, ARLINGTON, VA 22209—(703) 522-6000

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PETITIONERS' REPLY BRIEF

The opposition of the State Energy Resources Conservation and Development Commission (State Energy Commission) to Supreme Court review of the Ninth Circuit's decision is essentially an attempt to belittle both the nature and impact of that decision. According to the Commission, the Ninth Circuit's ruling was an "unremarkable decision" which "follow[ed] a wholly familiar legal path" and was bereft of "any national significance." State Energy Commission Consolidated Response to Petitions for Writ of Certiorari (Response) at 11, 27, 11. The effect of the court's decision in allowing a nearly total obstruction of the federal policy to encourage nuclear energy is disguised; the effect of California's nuclear moratorium on one man's ability to engage in his profession is for all practical purposes ignored. As is shown below, the State

Energy Commission has established no real basis for its claim that this case is inappropriate for review by this Court.

I

CONTRARY TO THE STATE ENERGY COMMISSION'S CLAIMS, CALIFORNIA'S ATTEMPT TO BLOCK NUCLEAR ENERGY DEVELOPMENT IN THE FACE OF CONTRARY FEDERAL POLICY VIOLATES THE ESTABLISHED LAW OF FEDERAL PREEMPTION

The State Energy Commission contends that California's moratorium on new nuclear plants is "so plainly authorized by Congress itself" that there can be no question of its legality. Response at 20. Yet this "plain authorization" was not apparent to either the California Legislative Counsel or the California Attorney General, both of whom concluded that the moratorium was federally preempted. Pacific Legal Foundation (PLF) Petition for Certiorari (PLF Petition) at 12 n.3. It was not apparent to the two district courts which independently ruled that the moratorium was invalid. It was not apparent to the Solicitor General of the United States, who has filed a brief amicus curiae supporting a grant of certiorari.

The State Energy Commission claims that the Ninth Circuit "expressly followed the decision" of *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972). Response at 22. However, whether one court *claims* to follow the decision of another is a far different and less significant matter than whether it actually *does*.[1] The State Energy Commission has not cited a single case

[1] Likewise, it is largely irrelevant that the State Energy Commission is statutorily prohibited from "mak[ing] any finding in conflict with applicable federal law or regulation." Cal. Pub. Res. Code § 25525, *quoted in* Response at 7. Such a provision cannot shield an action of the State Energy Commission from being examined as to its actual legality. More importantly, the moratorium on new nuclear plants is in effect until there is an *affirmative* finding by the State Energy Commission that a federally-approved waste disposal technology exists. Section 25525 does not compel the State Energy

(footnote continues)

in the area of nuclear energy, or for that matter in any area whatsoever, upholding an across-the-board state prohibition on activities expressly promoted by the federal government.[2]

The State Energy Commission attacks PLF's focus on the categorical nature of the nuclear moratorium. Supposedly, this characteristic merely demonstrates "California's preference for making some aspects of its licensing determinations on a *generic* rather than *ad hoc* basis." Response at 28. Because the state could accomplish the same result by "refus[ing] to license proposed nuclear plants, one by one," its imposition of a categorical prohibition on new nuclear plants is allegedly irrelevant. Response at 11.

In fact, as the Ninth Circuit itself admitted, even the denial of individual plant certification "might be based upon impermissible reasons." *Pacific Legal Foundation v. State Energy Resources Conservation & Development Commission,* 659 F.2d 903, 916 (9th Cir. 1981), Pacific Gas and Electric Company Appendix (PG&E App.) at 1, 21. The moratorium, however, goes far beyond this. California has not denied certification for one or more individual plants because they are unnecessary or too expensive; instead, it has explicitly decided that *no* new plants will be certified if they utilize *nuclear* power, until certain conditions are met. The across-the-board character of California's action is not an essential prerequisite to a finding of preemption, but it clearly demonstrates the

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(footnote continued)

Commission to make any finding whatsoever, and thus has no relevance to the question of the moratorium's legality. Yet the State Energy Commission, attempting to avoid any real analysis of the moratorium, characterizes this provision as "most significant." Response at 7; *see also id.* at 18. ("[I]n light of the Warren-Alquist Act's repeated injunctions to the Energy Commission to comply with federal law.") It is not.

[2] This federal policy was once again recognized in a decision issued by the District of Columbia Circuit after the PLF petition was filed:

> "It is not the function of the judicial branch either to initiate or to halt the development of a nuclear power industry. These national policy choices are constitutionally vested in the President and the Congress of the United States, and they have been made *in favor of proceeding." Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission,* No. 74-1586 (D.C. Cir. April 27, 1982), slip op. at 2 (Edwards, J., dissenting in part on other grounds) (emphasis added).

It is not within California's power to obstruct such a federal choice.

impermissible nature of California's decision. The impact of that decision on federal policy is undeniable—until the preconditions set by California are satisfied, there will be no further development in that state, or in any other state which follows suit, of an energy source which Congress has explicitly chosen to encourage.

II

THE RELATIONSHIP BETWEEN PROPOSITION 15 AND CALIFORNIA'S NUCLEAR MORATORIUM HAS BEEN ADMITTED BY BOTH THE STATE ENERGY COMMISSION AND THE NINTH CIRCUIT AND CANNOT NOW BE DENIED

Contrary to the State Energy Commission's claim, the enactment of the nuclear moratorium during the pendency of Proposition 15 strongly suggests that the moratorium invades an area explicitly reserved to federal control under 42 U.S.C. § 2021(k)—the regulation of radiation hazards.[3]

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[3] None of the statutes cited by the State Energy Commission supports its claim that this area has been so far relinquished to state control as to allow California to now categorically block new nuclear plants. For example, the State Energy Commission repeatedly cites the Clean Air Act Amendments of 1977, 42 U.S.C. §§ 7416 and 7422. Response at 5 n.8, 21. Yet the Environmental Protection Agency (EPA), which has the duty of implementing the Clean Air Act, has pointed out that these amendments were not intended to give states the ability to cause widespread industry shutdowns by exercising their new powers in extreme fashion.

> "That conclusion becomes even more inescapable in light of the 1977 Amendments, which added radioactive substances—long regarded as confirmed carcinogens and emitted from a wide variety of sources—to the coverage of the Act, with no mention anywhere of industry closures as the inevitable consequence." EPA, *Proposed Rulemaking: National Emission Standards for Identifying, Assessing and Regulating Airborne Substances Posing a Risk of Cancer*, 44 Fed. Reg. 58,641, 58,660 col. 3 (1979) (emphasis added, footnotes omitted).

The attempt to justify California's moratorium on the basis of these amendments is equally unsupported.

The relationship between Proposition 15 and the nuclear moratorium has been fully examined previously. PLF Petition at 4, 10-12. Proposition 15 was a referendum measure which "would have simply shut down all existing nuclear power plants and flatly prohibited the construction of new ones . . . ." State Energy Commission Appellate Brief at 9 (footnote omitted). The safety-related nature of Proposition 15 is evident from its text[4] and was admitted by the Ninth Circuit. *PLF v. State Energy Commission,* 659 F.2d at 924, PG&E App. at 38-39. In the words of the court, the California Nuclear Laws were "enacted as an alternative to . . . Proposition 15." *Id.,* PG&E App. at 37. The clear implication is that the safety concerns of Proposition 15 were addressed by the Nuclear Laws in general, and most specifically by the moratorium which produced the proposition's intended effect.[5]

The State Energy Commission attacks this reasoning as a "bizarre mode of statutory construction" because it attempts to

> "divine[ ] those purposes [of the moratorium] from an analysis of the text of another measure, Proposition 15, which was in fact defeated . . . despite this Court's observation that 'unsuccessful attempts at legislation are not the best of guides to legislative intent.' " Response at 22 n.28, *citing Red Lion Broadcasting Co. v. Federal Communications Commission,* 395 U.S. 367, 381 n.11 (1969).

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[4] Proposed Section 67502 of Proposition 15 states:

> "The people further find and declare that substantial questions have been raised concerning the effect of nuclear fission power plants on land use and land use planning, *as well as on public health and safety."* PLF Petition, Appendix 22 (emphasis added).

[5] The moratorium on its face prohibits new nuclear plants until a major safety issue, the disposal of nuclear waste, is resolved. The moratorium applies to all nuclear plants to be located in California, regardless of how they are to be financed or where the power they will generate is intended to be sold. If, as the State Energy Commission claims, the moratorium were intended to address only the economic concerns of California ratepayers, then it could have been drafted to say so and to accomplish this alleged goal by far narrower means.

This maxim of construction, however, has no applicability to a case such as this, where legislation has been enacted in order to *obviate* a pending referendum measure. Legislation should be construed in "the historical context in which it was written." *Securities and Exchange Commission v. Briggs,* 234 F. Supp. 618, 622 (N.D. Ohio 1964). Like the Ninth Circuit, the State Energy Commission admitted that the moratorium was designed to replace Proposition 15 in the minds of California's voters; in its words, the Nuclear Laws "[f]orestall[ed] voter approval" of Proposition 15. State Energy Commission Appellate Brief at 9. Given these circumstances, the similarity of purpose between the moratorium and Proposition 15 is apparent. At a minimum, these circumstances required that the Ninth Circuit closely scrutinize the state assembly committee report on the Nuclear Laws, the sole piece of legislative history upon which that court relied in upholding the moratorium. In fact, the Court called for precisely such scrutiny in *Perez v. Campbell,* 402 U.S. 637, 651-52 (1971). Instead, the Ninth Circuit uncritically accepted that legislative report as dispositive of the Nuclear Laws' purposes, and did not give *Perez* even a passing mention in its decision.

Given the relationship between Proposition 15 and the nuclear moratorium, it is certainly reasonable to look at the former in construing the latter. If there is anything that is "bizarre" here, it is the State Energy Commission's attempt to now divorce the nuclear moratorium from the circumstances that gave rise to it.

III

ROBERT THORNBERRY'S STANDING TO CHALLENGE CALIFORNIA'S NUCLEAR MORATORIUM IS BASED ON THE LOSS OF HIS JOB AND HAS NOTHING TO DO WITH THE RIGHTS OF THIRD PARTIES

The State Energy Commission claims that Robert Thornberry "has not even alleged a risk of state action directed against him," but rather "seeks to assert derivatively the third-party rights of the regulated utilities." Response at 10 (italics

omitted). This is a curiously roundabout characterization of a man whose job was destroyed by the law he now seeks to challenge. While third parties may benefit if Thornberry prevails on the merits, his claim is based on the injury *he* suffered. That claim does not depend on whether Thornberry has a private right of action under the Atomic Energy Act; it is based on the fact that his right to pursue an occupation, a right guaranteed by the Constitution (*Meyer v. Nebraska,* 262 U.S. 390, 399 (1923)) was impaired by an unconstitutional state statute.

The State Energy Commission's suggestion that Thornberry is not "the most effective advocate of the rights at issue" (Response at 14 n.17) is similarly unpersuasive. Thornberry may not be the most prominent of the parties in this case, but his injury on a personal level is no less severe than that suffered by the utilities. Thornberry is certainly the best advocate of *his* right to engage in *his* occupation.

The State Energy Commission challenges Thornberry's right to seek review of the Ninth Circuit's substantive ruling, claiming that this ruling was allegedly part of the "disposition of a case to which he was not a party." Response at 14 n.18. The Ninth Circuit's ruling on the merits, however, clearly controls the course of any litigation that Thornberry may pursue on remand. In fact, it makes such further litigation futile, and it is thus so "fundamental to the further conduct of the case" that review by this Court is appropriate. *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *see* PLF Petition at 19-20.[6] The Ninth Circuit apparently contemplated this when it remanded the case "for trial or for other proceedings *consistent with this opinion.*" 659 F.2d at 928, PG&E App. at 46 (emphasis added). Moreover, the State Energy Commission had expressly *requested* that the Ninth

[6] In its statement of the questions presented for review, the State Energy Commission implies that PLF seeks review by this Court of the Ninth Circuit's reversal of Thornberry's summary judgment. This is misleading. The PLF Petition does not request review of the Ninth Circuit's ruling that there were disputed issues of fact which precluded summary judgment, as this is not an appropriate matter for the Supreme Court's attention. The petition does, however, seek review of the Ninth Circuit's *legal* ruling that the destruction of Thornberry's job by the moratorium is not a sufficient basis for standing to challenge that law. *See* PLF Petition at 16.

Circuit proceed to rule on the merits even if it found against Thornberry on the issue of standing. As the State Energy Commission stated in its appellate brief,

> "appellants urge this Court, in framing its order on remand, to reject the district courts' preemption holding *on the merits*—lest a cloud of unfounded constitutional doubt overhang the laws of California and of many other states for the duration of this suit." State Energy Commission Appellate Brief at 15 (emphasis added, footnote omitted).

Having gotten the result that it asked for in Thornberry's case, the State Energy Commission cannot now claim that he was not a party to that result.[7]

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[7] The State Energy Commission also attacks the inclusion of four other petitioners in addition to Thornberry in the PLF Petition. Response at 1-2 n.1. The presence or absence of these other parties has no practical effect at this stage in this action for declaratory judgment. The State Energy Commission claims that these four organizations were not parties to the proceedings before the Ninth Circuit, yet these groups were listed as parties *by the State Energy Commission* in the appeal below. *See* State Energy Commission Appellate Brief Certificate of Counsel to Appellate Brief. More importantly, the presence or absence of these groups has no practical significance at this stage in this action for declaratory relief. The PLF Petition is properly before this Court, and its contents are essentially unaffected by the inclusion of these other parties as petitioners in addition to Thornberry.

CONCLUSION

In opposing PLF's Petition for Certiorari, the State Energy Commission has avoided two central facts. The first is the unarguable obstruction of the federal policy to promote nuclear energy caused by California's prohibition of new nuclear plants. Second is the destruction of Robert Thornberry's job by the moratorium, and the Ninth Circuit's ruling that this is an insufficient basis for standing. These facts undercut all of the State Energy Commission's arguments against review by this Court. For this reason, and for the reasons previously set forth in the PLF Petition, the Supreme Court should issue a writ of certiorari to review the Ninth Circuit's decision.

Respectfully submitted,

RONALD A. ZUMBRUN
ROBIN L. RIVETT
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154

RAYMOND M. MOMBOISSE
Counsel of Record

SAM KAZMAN
Pacific Legal Foundation
1990 M Street, N.W., Suite 550
Washington, D.C. 20036
Telephone: (202) 466-2686

Attorneys for Petitioners

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On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF OF THE ATOMIC INDUSTRIAL FORUM AS AMICUS CURIAE IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

LEONARD M. TROSTEN
Counsel of Record
EUGENE R. FIDELL
DANIEL J. CONWAY
LEBOEUF, LAMB, LEIBY & MACRAE
Suite 1100
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 457-7500
Attorneys for Amicus Curiae

LINDA L. HODGE
Staff Counsel
ATOMIC INDUSTRIAL FORUM, INC.
7101 Wisconsin Avenue
Washington, D.C. 20014

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On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF OF THE ATOMIC INDUSTRIAL FORUM AS AMICUS CURIAE IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

In accordance with this Court's Rule 36, the Atomic Industrial Forum ("the Forum") has received and filed with this Court the written consents of counsel for each of the parties to appear as *amicus curiae* in this proceeding. This brief is submitted by the Forum in support of the petitions for certiorari filed by the Pacific Legal Foundation ("PLF"), Pacific Gas and Electric Company ("PG&E") and the Southern California Edi-

son Company ("SCE") seeking review of the Ninth Circuit's decision in *Pacific Legal Foundation* v. *State Energy Resources Conservation and Development Commission*, 659 F.2d 903 (9th Cir. 1981) (PG&E App. 1-52).[1]

INTEREST OF THE ATOMIC INDUSTRIAL FORUM

The Forum is an association of approximately six hundred domestic and overseas organizations involved in the peaceful uses of nuclear energy. The membership includes electric utilities, manufacturers, architect/engineer/construction firms, service organizations, consultants, uranium producers, radionuclide and radiopharmaceutical suppliers, financial institutions, universities, labor unions, government agencies and research laboratories.

Unless this Court grants certiorari, reverses the Ninth Circuit's decision and restores the congressionally-determined balance between federal and state interests in the regulation of nuclear facilities, continued progress in the development of nuclear power as an energy option will, as a practical matter, be outlawed in California and every other jurisdiction that follows its lead. The Ninth Circuit's decision will encourage additional, burdensome and unnecessary state regulation of existing nuclear facilities, endangering the level of nuclear development thus far achieved. Until this Court speaks to the proper accommodation of the competing governmental interests, the congressional program will be thwarted and the nuclear industry will be exposed to the already apparent centrifugal state and local forces which are encouraged under the Court of Appeals' ruling.

State prohibitions on nuclear development have serious consequences for the Forum's members. One hundred and five of

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[1] Citations to the decisions below are to the Appendix to PG&E's Petition, which is cited as "PG&E App." Citations to the PLF Appendix are indicated "PLF App." The PG&E Petition is cited "PG&E Pet."

the Forum's 122 domestic electric operating utility members rely on, or plan in the future to rely on, nuclear power generation for at least a portion of their power needs. State and local moratoria on nuclear development will also be a severe blow to Forum members involved in all phases of construction and operation of nuclear facilities including each stage of the fuel cycle. Although the future of atomic energy is of vital concern to the nuclear industry, that is, of course, only a small part of the picture. The continued availability of the nuclear option is vital to the entire Nation as a means — with other energy sources that are or may become available — of reducing domestic vulnerability to undependable foreign sources of oil and gas. California's legislation disregards these larger considerations.

STATEMENT

The Ninth Circuit held that the Atomic Energy Act of 1954, as amended ("1954 Act"),[2] does not preempt a California moratorium on the certification of new nuclear power plants pending state determination that the federal government has approved of, and that there in fact exists, a demonstrated radioactive waste disposal technology. PG&E App. 37-40. This holding was based solely on the state's assertion that the law in question was not intended as a regulation of radiation hazards. *Id.* 35, 40. The Ninth Circuit's decision raises an important question of federal-state relations: whether a state, consistent with the supremacy clause, may outlaw an activity strictly regulated by the federal government and serving an important federal purpose simply by asserting that the state is motivated by some other purpose allowed by federal law.

The Ninth Circuit reversed two district courts in rejecting a challenge to California's regulation of the building and siting of nuclear facilities. At issue was California's complex two-step

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[2] 42 U.S.C. §§ 2011-2284 (1976 & Supp. IV 1980).

procedure for certification of new power plants[3] administered by the State Energy Resources Conservation & Development Commission ("Energy Commission"), the respondent in this Court. PG&E App. 20. Objection was also made to: (1) the requirement that an applicant for certification acquire land development rights to assure safe population densities around a proposed plant; and (2) the requirement that an applicant propose at least three alternate sites for a proposed plant. Cal. Pub. Res. Code §§ 25528, 25503 (West 1977); PG&E App. 196, 217.

Three other challenged sections specifically condition the certification of nuclear plants. Cal. Pub. Res. Code §§ 25524.1, 25524.2, 25524.3 (West 1977). Section 25524.1(a) imposes a moratorium on certification of proposed nuclear plants that would use reprocessed fuel[4] until "[t]he commission finds that there has been developed and that the United States through its authorized agency has identified and approved, and there exists a technology for construction and operation of nuclear fuel rod reprocessing." This determination, if ever made, may be overruled by the state legislature. PG&E App. 207-08. Section 25524.1(b) requires a case-by-case analysis of whether a proposed plant's spent fuel storage capacity is adequate before certification. PG&E App. 208.

Section 25524.2 imposes a moratorium on certification of new nuclear plants until "[t]he commission finds that there has

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[3] Cal. Pub. Res.Code §§ 25500, 25502, 25504, 25511, 25512, 25514, 25516, 25517, 25519, 25520, 25523, 25532 (West 1977), reproduced in PG&E App. 193-219. In the case brought by PLF, only the nuclear waste moratorium, § 25524.2, was at issue in the Court of Appeals. PG&E App. 6-7.

[4] Fuel reprocessing involves recovering unused fissionable material from spent fuel. For a description of the process see *Natural Resources Defense Council, Inc.* v. *NRC*, 539 F.2d 824, 830-31 (2d Cir. 1976), *vacated and remanded sub nom. Westinghouse Electric Corp.* v. *Natural Resources Defense Council, Inc.*, 434 U.S. 1030 (1978).

been developed and that the United States through its authorized agency has approved and there exists a demonstrated technology or means for the [permanent] disposal of high-level nuclear waste." The Energy Commission's determination that a federal plan has been enacted and that the necessary technology has been demonstrated may also be overruled by the legislature. PG&E App. 210-12.

Section 25524.3 imposes a moratorium on the construction of nuclear power plants until the Energy Commission has determined whether nuclear reactors should, in its opinion, "be either underground or berm contained." [5] As is the case with the other two moratorium provisions, the Energy Commission's decision may be reversed by the legislature.

The Ninth Circuit dismissed the challenges to the certification procedure, the development rights procurement requirement, the fuel reprocessing moratorium, and the spent fuel rod storage provision as not ripe for judicial consideration. PG&E App. 20-25. The challenge to the containment report moratorium was rejected because, in the Ninth Circuit's view, the issue was mooted by submission of the containment report to the legislature. *Id.* at 25.

The Court of Appeals held that the challenges to the nuclear waste moratorium and the three-site requirement were ripe for review. PG&E App. 23, 25-27. Both provisions were sustained. The court accepted the state's assertion that the nuclear waste moratorium was not intended to regulate radiation

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[5] "Berm containment" requires building a nuclear plant in an excavated pit and backfilling with dirt. It is a "cut and cover" technique intended "to increase the margin of safety in the event of an accident which breaches the containment building." PG&E App. 6 n.8, *quoting* Cal. Assembly Comm'n on Resources, Land Use and Energy, *Reassessment of Nuclear Energy in California: A Policy Analysis of Proposition 15 and its Alternatives* 155 (1976).

hazards, and thus concluded that the provision was not preempted by the 1954 Act. PG&E App. 37. The three-site provision was deemed a legitimate exercise of the state's zoning authority, which did not have the purpose of regulating radiation hazards. PG&E App. 40-42.

SUMMARY OF ARGUMENT

The California legislation sustained by the Ninth Circuit is another in a growing series of state laws that conflict with federal energy policy. The Ninth Circuit decided incorrectly an important question of federal-state relations by uncritically accepting the state's self-serving claim as to the purpose of its nuclear laws. A decision by this Court is necessary to define the extent to which state regulation of nuclear energy is preempted by the 1954 Act.

ARGUMENT

A.

The Ninth Circuit's Decision Raises An Important Issue Of Federal-State Relations That Is Of National Scope

The challenged California statutes present yet another example of the centrifugal tendencies pitting state and federal energy policies against one another. As our society has come to focus on the limited range of available energy sources, the states have, with increasing fervor, sought to advance their own policy judgments and obtain parochial advantage at the expense of expressed national goals concerning the use, allocation and development of alternative energy sources.

This conflict has manifested itself in several cases recently decided by this Court. For example, last Term this Court held that Louisiana could not impose a first use tax on natural gas flowing through the state from the outer continental shelf because the tax interfered with federal regulation of gas cost allocation and because the tax constituted an unreasonable burden on interstate commerce. *Maryland* v. *Louisiana*, 451

U.S. 725 (1981). Also last Term, this Court considered whether Montana's severance tax on coal was preempted by the Energy Policy and Conservation Act of 1975, 42 U.S.C. § 6201(6) (1976), and the Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. § 8301(b)(3) (Supp. IV 1980). *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 (1981).

This Term, a New Hampshire statute prohibiting the export of hydroelectric energy was held to be unconstitutional because section 201(b) of the Federal Power Act, 16 U.S.C. § 824(b) (1976 & Supp. IV 1980), does not confer on the states authority to regulate interstate sales of energy beyond the limits set by the Commerce Clause. *New England Power Co.* v. *New Hampshire*, 102 S.Ct. 1096 (1982). Presently before this Court is another state's tenth amendment challenge to provisions of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2601-45 (Supp. IV 1980), which allows the Federal Energy Regulatory Commission an expanded role in the regulation of intrastate electric rates. *FERC* v. *Mississippi*, 452 U.S. 936 (1981) (No. 81-1749) (noting probable jurisdiction).

The federal-state conflict presented by these petitions is no less important — and no less in need of definitive resolution — than those raised in the cases cited above. Federal regulation of nuclear energy, along with the other federal energy regulatory laws, is intended to assure adequate, dependable energy for the entire nation. Just as it was necessary for this Court to consider the important federal-state relations questions in the areas of gas, coal and hydroelectric energy regulation, so too, consideration should be given to the proper accommodation of these interests in the nuclear regulatory field.

The 1954 Act serves an important federal interest seeking "to encourage widespread . . . development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public." 42 U.S.C. § 2013(d) (1976).

Congress viewed the development and use of nuclear energy "for military and for all other purposes" as "vital to the common defense and security" of the country. *Id.* § 2012(a). Congress intended to establish "a program of conducting, assisting, and fostering research and development in order to encourage maximum scientific and industrial progress" regulated by "a program for Government control of the possession, use, and production of atomic energy and special nuclear material. . . ." *Id.* § 2013(a), (c)-(d); *see also* S. Rep. No. 1699, 83d Cong., 2d Sess. 1-4 (1954).[6]

None of the federal energy regulatory programs referred to above is nearly as detailed as that created by the 1954 Act. The Nuclear Regulatory Commission ("NRC") pervasively regulates the nuclear industry.[7] *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 24 (1976); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 525-27 (1978). Under the 1954 Act, an entity seeking to construct and operate a nuclear production or utilization facility must obtain from the NRC separate licenses for construction and operation of the project. 42 U.S.C. §§ 2133, 2232, 2235, 2239 (1976 & Supp. IV 1980). The licensing procedures entail multileveled review with extensive opportunities for state and public participation, and exhaustive consideration of technical, safety and environmental issues.

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[6] These congressional objectives have obtained Executive approval. In announcing a series of initiatives for expanded use of nuclear energy, President Reagan has emphasized that nuclear energy's contribution is essential to the economic well-being of the Nation. President's Statement Announcing a Series of Policy Initiatives, 17 Weekly Comp. Pres. Doc. 1101 (Oct. 8, 1981).

[7] Ironically, the concurring opinion below emphasizes that the NRC's "oversight is clearly intended to be comprehensive," and that Congress' "goal of bringing to the field of nuclear energy a single, expert, public agency to interpret and carry out the provisions of the [1954 Act]" should not be interfered with by the courts. PG&E App. 52. Quite obviously, that goal is thwarted just as severely by interference from the states.

See 42 U.S.C. §§ 2239(a), 4321-69 (1976 & Supp. IV 1980); 10 C.F.R. §§ 2.101, 2.105, 2.714, 2.721, 2.786, 2.787, 50.30(f), 50.33, 50.33a, 50.34(a), 51.22-26; 10 C.F.R. Pt. 2 App. A § V (1981). In addition, the NRC closely regulates standards for radiation protection, the possession, packaging and transportation of radioactive materials, medical uses of nuclear materials, reactor siting, physical protection of reactors, and financial protection requirements. 10 C.F.R. Pts. 20-170 (1981).

The states may and generally do participate fully in the federal regulatory process, even though they may well lack the staff depth necessary to address the more technical issues of radiological safety. During each phase of a project licensing proceeding, interested states are permitted to participate as a matter of right. 10 C.F.R. § 2.715(c) (1981). Participation as of right is not limited to the site location state or even adjacent states. For example, California participated in a licensing proceeding for a fuel cycle facility as far away as Tennessee, *Exxon Nuclear Co. (Nuclear Fuel Recovery and Recycling Center)*, 6 N.R.C. 873 (1977), thus underscoring the fact that nuclear industrial activity involves interests that are truly national and do not stop at state boundaries. States are also accorded ample opportunity to contribute to the environmental review of nuclear power plant construction and operation under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321-70 (1976 & Supp. IV 1980); 10 C.F.R. §§ 51.23(b), 51.24(b), 51.26 (1981). Finally, states may — by agreement with the NRC and subject to NRC standards — regulate low level nuclear materials. 42 U.S.C. § 2021(b), (d), (f), (g), (i), (j) and (m) (1976 & Supp. IV 1980).

Congress has not altered its views as to the need for further development of nuclear energy in order to assure that the

Nation's energy needs will be met.[8] A number of states, unfortunately — despite Congress' goal and the generous role afforded them under the federal regulatory scheme — have seen fit to decide individually whether use of nuclear energy should be permitted. The resulting frustration of Congress' goal to achieve uniform regulation and to encourage nuclear energy is national in scope. Currently, in addition to California, at least

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[8] Subsequent to the 1954 Act, Congress reaffirmed the importance of nuclear development by enacting the Price-Anderson Act of 1957, 42 U.S.C. §§ 2012, 2210, which "had the dual purpose of protect[ing] the public . . . and encourag[ing] the development of the atomic energy industry." *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 64 (1978). Congressional intent to further nuclear development was reiterated twice with extension of the Price-Anderson Act in 1965 and 1975.

Passage of the Energy Reorganization Act of 1974 did not alter the federal purpose. The only sections of the 1954 Act that were repealed were those that had established and organized the Atomic Energy Commission. 42 U.S.C. §§ 2031, 2032 (1970), *repealed by* Pub. L. No. 93-438, § 104, 88 Stat. 1237 (1974). The Federal Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C. §§ 5901-20 (1976 & Supp. IV 1980), underscored Congress' intent that "the policies and provisions of the Atomic Energy Act of 1954 . . . shall continue to apply to research, development and demonstration programs." *Id.* § 5902(b)(2). The Industrial Fuel Use Act's purpose to "foster the greater use of coal and other alternate [nonpetroleum] fuels" includes uranium and thus reemphasizes the importance of nuclear development for the welfare of the country. 42 U.S.C. §§ 8302(a)(6)(A), 8401 (Supp. IV 1980).

Under the Clean Air Act, states may regulate radioactive emissions to the extent that the Environmental Protection Agency lists radioactive materials as pollutants. The NRC, however, oversees implementation of state regulation. 42 U.S.C. § 7422 (Supp. IV 1980). Congress has granted some increased opportunity for state involvement in land use and siting decisions. NRC Appropriation Authorization Act of 1980, Pub. L. No. 96-295, § 108(f) 94 Stat. 780 (1980). These enactments, however, only emphasize the general rule of preemption, and the fact that it is Congress' role, not that of the courts, to enlarge state authority.

five states ban additional nuclear power facilities.[9] Numerous states have laws regulating nuclear waste disposal and nuclear material transportation.[10] Other states have recently enacted laws that single out the nuclear industry.[11] Each of these

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[9] Statutes prohibit additional nuclear facilities in Connecticut, Maine, Montana and Oregon. Conn. Gen. Stat. Ann. § 22a-136 (West Supp. 1981); Me. Rev. Stat. Ann. tit. 10 §§251-56 (1980); Mont. Code Ann. §§ 75-20-1201 to -05 (1979); Act of July 1, 1979, ch. 510, 1979 Or. Laws; Wisconsin has imposed a ban on new nuclear facilities by administrative action. *Advance Plans for Construction of Facilities, Findings of Fact and Conclusions of Law*, [1964-81 New Developments Transfer Binder] Nuclear Reg. Rep. (CCH) ¶ 20,093 at 16,562 (Wis. Pub. Serv. Comm'n Aug. 17, 1978). *See also* Md. Ann. Code art. 78, § 54A (Supp. 1981). (Prior to facility certification, Public Service Commission must consider *inter alia* availability of means for waste disposal.)

[10] Various statutory schemes are employed to regulate waste disposal and the construction of waste disposal facilities. *See, e.g.*, Conn. Gen. Stat. Ann. § 22a-137 (West Supp. 1981); Ga. Code Ann. § 88-1306.1 (Supp. 1981); Mich. Comp. Laws Ann. § 325.491 (West Supp. 1981-82); Minn. Stat. Ann.§§ 116C.72-.73 (West Supp. 1982); Miss. Code Ann. § 17-17-48 to -51 (Supp. 1981); N.H. Rev. Stat. Ann. §§ 125:77b-:77f (Supp. 1979); N.M. Stat. Ann. § 74-4A-11.1 (1981); N.Y. Pub. Auth. Law § 1854-a (McKinney 1981); Vt. Stat. Ann. tit. 10 §§ 6501-06 (Supp. 1981); *see generally* NRC, *Information Report on State Legislation, Radioactive Waste Disposal and Management* (Spec. ed. Dec. 1981).

Numerous states and localities ban or regulate transportation of nuclear materials. *See, e.g.*, Ill. Ann. Stat. ch. 111½ § 230.22 (Smith-Hurd Supp. 1981-82); La. Rev. Stat. Ann. § 30-1111 (West Supp. 1982); Wash. Rev. Code Ann. §§ 70.99.010-.910 (West Supp. 1982); W. Va. Code § 16-27-2 (West 1981); N.Y.C. Health Code § 175.111(1) (1976).

[11] A variety of statutory schemes are directed at reactor siting and construction. Rhode Island and Vermont require legislative approval of new nuclear plants. R.I. Gen. Laws § 42-64-14.1 (1977); Vt. Stat. Ann. tit. 30 § 248(c) (Supp. 1981). In Hawaii a two-thirds majority in each house of the legislature must approve a proposal for a fission reactor. Hawaii Const. art. XI § 8 (1978). The governor must approve proposed facilities in Washington. Wash. Rev. Code Ann. § 80.50.100 (Supp. 1981).

schemes either halts nuclear development outright or may be applied in a way that helps achieve that result

This case presents a needed opportunity to articulate the criteria by which state attempts to regulate nuclear plant construction and operation are to be judged. The federal-state relationship created by the 1954 Act is not only of vital concern to the nuclear industry, it is "a question of great significance to the entire nation." Tribe, *California Declines the Nuclear Gamble: Is Such a State Choice Preempted?* 7 Ecol. L. Q. 679 (1979). [12] The governing principles should be stated now.

B.

The Ninth Circuit's Decision Fails To Weigh Properly The Competing Federal-State Interests And Is At Odds With Prior Decisions Of This Court

The Ninth Circuit erred by accepting at face value California's assertion that its nuclear laws were not enacted for the impermissible purpose of regulating radiation hazards. A single legislative committee report was cited by the court for the proposition that the waste disposal moratorium "is directed towards purposes other than protection against radiation hazards." PG&E App. 40. In a classic negative pregnant, however, the report states that "waste disposal safety is not *directly* addressed by the [nuclear laws]." *Id.* at 40 (emphasis added). It is obvious that even in the legislature's eyes the law was indirectly aimed at regulating radiation hazards associated with nuclear waste. For preemption purposes this is sufficient to invalidate the statute; in fact, however, the state's attempt to regulate radiation hazards has been direct.

In *Perez* v. *Campbell*, 402 U.S. 637, 652 (1971), this Court refused to allow state legislatures to nullify "unwanted federal

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[12] The national importance of this case is further demonstrated by the fact that twenty-three states appeared as amici curiae in the Ninth Circuit. PG&E App. 3 n.2.

legislation by simply publishing a legislative committee report articulating some state interest or policy — other than frustration of the federal objective — that would be tangentially furthered by the proposed state law." So too, where federal and state interests conflict, the mere "incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack," *Kassel* v. *Consolidated Freightways Corp. of Delaware*, 450 U.S. 662, 670 (1981) (plurality opinion), even though state safety regulations enjoy "a strong presumption of validity." *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959). There must be "a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U.S. 429, 441 (1978); *Kassel*, 450 U.S. at 670-71.

The scrutiny called for by *Perez* when determining whether a state law that nullifies an important federal policy is actually intended to advance a legitimate state purpose should be no less searching. Indeed, where the state law stands as an obstacle to an important federal purpose, in an area pervasively regulated by the federal government with only narrow areas specifically carved out for state regulation, the burden should be on the state to demonstrate with some cogency that a legitimate purpose is in fact significantly advanced by its legislation. These principles apply with great force in the nuclear area, where Congress draws on not only the Commerce Power but other sources of constitutional authority as well. 42 U.S.C. §§ 2011-12 (1976); *Northern States Power Co.* v. *Minnesota*, 447 F.2d 1143, 1147 (8th Cir. 1971), *aff 'd mem.*, 405 U.S. 1035 (1972) (common defense and security, interstate and foreign commerce, promotion of general welfare). California having failed even to meet the standard articulated in *Raymond* and *Kassel*, its nuclear waste moratorium should not have been sustained.

State regulation must be consistent with "the respective federal-state roles intended by Congress." *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 621 n.4 (1978); *see also Perez* v. *Campbell*, 402 U.S. at 651-52. A state may well have a legitimate, permissible reason for enacting legislation that also happens to affect an area preempted by federal law. A state might, for example, seek to regulate a subject generally governed by federal law, but contend that its regulation is for some permitted purpose. Or a state might acknowledge that the questioned regulation reflects mixed legislative motives, some of which might be permissible in Supremacy Clause terms, and others not. Regardless of the label affixed, however, if the Supremacy Clause is to be anything more than an empty promise, the inquiry must not end with the state's contention, as happened below.

Where Congress has expressly carved out a *limited* sphere for state regulation in an area that, from its inception, has been (and by its very nature must be) pervasively regulated by the federal government, a special burden rests on the state. The inquiry should include a careful assessment of whether the state program acts upon the federally-regulated conduct in a way that impedes the achievement of federal objectives, as well as a determination of the factual validity of state claims that some other ostensible purpose is actually being served. A state program that imposes a moratorium on a type of industrial activity the United States not only regulates, but indeed, wishes to encourage, quite clearly fails under the first of these criteria. In this case, the second criterion is also not satisfied.

States may regulate the sale of electricity from nuclear facilities once it is produced. 42 U.S.C. § 2018 (1976); 100 Cong. Rec. 12015 (1954) (remarks of Sen. Hickenlooper). However, the federal government never relinquished its authority to regulate the construction and operation of nuclear plants. 42 U.S.C. § 2021(c) (1) (1976 & Supp. IV 1980). Except as permitted by the Clean Air Act and other specific federal

legislation, the states are prohibited from regulating radiological hazards. *Northern States Power Co.*, 447 F.2d at 1149, *construing* 42 U.S.C. § 2021 (1976 & Supp. IV 1980).

California asserts that its nuclear laws were intended as financial and economic regulation, but the legislative history reveals that an indirect purpose was nuclear waste disposal safety. PG&E App. 40. Contrary to the Ninth Circuit's belief, there is no evidence other than ambiguous statements in the legislative committee's report that the legislature intended the nuclear laws as a form of financial or economic regulation. *Id.* 38-40. The weight of available evidence suggests that this is a sham.

A sensitive weighing of the extent to which the state's asserted purpose is served against the obstacle created for achievement of the federal purpose dictates that the challenged provisions be deemed invalid. California's nuclear laws were intended to "regulate" nuclear energy out of existence. They do nothing to further the state's purported interest in sound financial management of regulated companies. The state's regulatory structure for public utilities existed long before passage of the nuclear laws. That structure permits the state to determine the financial and economic soundness of any proposed plant. California's Public Utility Commission ("PUC") administers a comprehensive program for the review and evaluation of proposed plants, including consideration of economic, technological and environmental aspects of any plant proposal. Cal. Pub. Res. Code § 25504 (West 1977). The Energy Commission may seek the PUC's recommendations concerning the economics of any proposed plant, *id.* § 25506.5, and is required to hold hearings on the electric demand basis for any proposal. *Id.* § 25509. In view of this preexisting regulatory program, California's nuclear laws would have been superfluous if they, too, were intended merely as financial or economic regulatory mea-

sures. It is, however, improper to impute a useless act to any legislature.

The paradox of California's statutes is underscored by the absence of any requirement that waste disposal or fuel rod reprocessing be found to be economical or cost effective. Rather, taken together, the moratorium provisions allow the Energy Commission and the legislature to second-guess the federal government concerning the existence of the relevant technology. The state must not only determine whether a federal plan has been adopted; it must also determine to its own satisfaction whether there exists a *demonstrated* waste disposal and reprocessing technology.[11]

The nuclear laws are also a striking departure from prior California utility regulation in that they single out nuclear energy. As originally enacted, the bills provided that the nuclear laws would not become operative if Proposition 15 were approved by the voters. PLF App. 21. As the Ninth Circuit acknowledged, PG&E App. 38-39, the purpose of Proposition 15 was to limit radiation hazards. Since the nuclear laws were intended to take the place of Proposition 15, one can only assume they were intended to serve the same purpose.

When read together and with other provisions of the California Resources Code, the nuclear laws evince an unmistakable intent to limit radiation hazards. The containment report was intended to help determine whether undergrounding or berm containment of nuclear plants is "necessary, effective or economically feasible to meet the requirements of Sections 25511

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[11] The Ninth Circuit stated that "[i]t is not clear whether [the waste moratorium provision] would permit California to disapprove a method of waste disposal that the NRC has approved." PG&E App. 40 n.35. The plain words of the statute, however, allow not only the legislature, but the Energy Commission to determine whether the technology needed for waste disposal exists. The statute as written plainly puts the state in competition with federal authority in a preempted field.

and 25520." These sections apparently seek to enhance public health and safety. A provision singling out nuclear facilities because of health and safety reasons can only be directed at a perceived danger unique to nuclear facilities: radiation hazards. Regulation of radiation hazards, however, is preempted by the 1954 Act. *Northern States Power Co.*, 447 F.2d at 1149-54.

The Ninth Circuit avoided coming to grips with California's intent as reflected in the legislation as a whole by eliminating from review all but the waste disposal moratorium and the three site requirement challenges as either unripe, or in the case of the containment report moratorium, moot. PG&E App. 20-27. This "divide and conquer" approach to the task of discerning the state's true objective was mistaken. The challenges to the certification procedure, the land development requirement, the reprocessing moratorium and the spent fuel provisions are ripe for review in any event. Each of these provisions has a present, significant, adverse impact on the utilities. So long as they remain in force, the utilities quite rightly will not expend the time and money needed for initial planning of additional nuclear plants. [14]

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[14] It takes years of utility and consultant effort as well as millions of dollars to prepare a license application for a nuclear plant. PG&E App. 71-72. Plans must be made long in advance if a plant is to be available when needed. *Id.* PG&E had expended $10 million on its Stanislaus project before the Energy Commission summarily rejected its Notice of Intent. *Id.* 72.

Regulatory cost and uncertainty are serious disincentives to the further development of nuclear power. *See, e.g.*, Cohen, *Innovation and Atomic Energy: Nuclear Power Regulation, 1966-Present*, 42 Law & Contemp. Probs. 67 (1979). As a practical matter, the climate of uncertainty fostered by the challenged provisions of California law will have a profound chilling effect on industry willingness to incur the costs of planning new facilities. Thus, the provisions create a *de facto* moratorium. PG&E Pet. 24-27. A failure to consider the challenges is likely to mean that they will never be heard. *See Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 81-82 (1978).

Finally, "the relationship between state and federal laws as they are interpreted and applied, not merely as they are written" must be considered. *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 526 (1977). Here, as set forth in PG&E's petition, the contemporaneous administrative gloss applied to the Notice of Intent provisions confirms that the legislation was aimed directly at radiological health and safety. PG&E Pet. 22-23. The Court of Appeals ignored this.

In sum, the case calls upon the Court to guide the Ninth Circuit and other lower courts as to the method for evaluating claims that state nuclear legislation does not intrude on the sphere reserved by Congress to federal regulation. The starting point for this analysis should be the elementary notion that the care with which such measures are examined must be directly proportional to the pervasiveness of the federal scheme and the substantiality of the national interest in the particular industrial activity in question. The court below never brought these overarching principles into focus.

CONCLUSION

For the foregoing reasons certiorari should be granted.

Respectfully submitted,

LEONARD M. TROSTEN
Counsel of Record
EUGENE R. FIDELL
DANIEL J. CONWAY
LEBOEUF, LAMB, LEIBY & MACRAE
Suite 1100
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 457-7500
Attorneys for Amicus Curiae

LINDA L. HODGE
Staff Counsel
ATOMIC INDUSTRIAL
FORUM, INC.
7101 Wisconsin Avenue
Washington, D.C. 20014

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IN THE

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PETITIONERS
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CALIFORNIA STATE ENERGY RESOURCES CONSERVATION & DEVELOPMENT COMMISSION,
RESPONDENTS
PACIFIC LEGAL FOUNDATION, ET AL.,
V.
CALIFORNIA STATE ENERGY RESOURCES CONSERVATION & DEVELOPMENT COMMISSION,
RESPONDENTS

ON APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA, URGING GRANT OF WRIT OF CERTIORARI

DAVID CRUMP
LAW SCHOOL
UNIVERSITY OF HOUSTON
HOUSTON, TEXAS 77004
(713) 749-3878
ATTORNEY OF RECORD

J. GREGORY COPELAND
BAKER & BOTTS
ONE SHELL PLAZA
HOUSTON, TEXAS 77002

OF COUNSEL:
WILKES ROBINSON
127 W. 10TH ST.
KANSAS CITY, MO. 64105
H.E. BOWER
5 GREENWAY PLAZA
HOUSTON, TEXAS

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INTEREST OF AMICUS CURIAE

The Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm.[1] Its goals include preservation of the market system and establishment of a better balance between the federal government and the States. All litigation undertaken by LFA is approved by its Board of Trustees, the majority of whom are attorneys.

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1 All parties have consented to the filing of this brief by LFA. Letters of consent have been lodged with the Court.

LFA has particular expertise in matters relating to energy. During the past twleve months, it has been a participant in litigation to preserve market pricing of oil and gas in cases arising from Kansas, Wyoming, Colorado, Oklahoma and Texas. It has also supported the market system in uranium resources, undertaken efforts to maintain a viable nuclear industry, and participated in litigation concerning cogeneration of electricity. LFA is affiliated with the Gulf Coast & Great Plains Legal Foundation of Kansas City, which has undertaken similar activities with respect to coal.

Most of LFA's members and Trustees reside in the central Southwest. This area has large deposits not only of oil and gas, but of lignite and uranium as well. Currently, a large portion of natural gas produced in the region is transported to California. Such gas is priced far below market, owing to price regulation. Because of desire to maintain assured supply, this region has itself avoided such regulation of gas consumed intrastate.[2] LFA's members therefore pay utility prices above the national average.[3] The actions taken by California that are complained of here will aggravate this situation, which cannot be resolved in the absence of coordinated national effort.

STATEMENT OF THE CASE

This litigation concerns the "California Nuclear Laws," a series of enactments hostile to the development of nuclear generating capacity. Two statutory requirements are of principal concern here.[4] First, the "three-site" provision requires applicants to provide the California Natural Resources Conservation and Development Commission ("Commission") a choice of three different

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2 Historically, California has undertaken vigorous litigation to ensure the maintenance of such prices below market. See, e.g., Southern Louisiana Area Rate Cases, 428 F.2d 414 (1970). Such efforts have been a factor in inducing shortages. Id.

3 See, e.g., American Chamber of Commerce Research Ass'n, Fourth Quarter Inter-City Cost of Living Indicators (1981).

sites. This requirement applies even if the federal Nuclear Regulatory Commission ("NRC") finds one site in the State unambiguously superior from the standpoint of protection from radiation or environmental hazards. Secondly, the "moratorium" provision prevents new plant construction until and unless the NRC certifies a particular method of waste disposal, which the California Commission must independently determine to meet California's own state waste disposal requirements. NRC has confronted the problem of waste disposal repeatedly and frequently.[5] California's statutes represent an open disagreement with NRC's approach. They reflect an effort to force it to address California's concerns under a different timetable and in a different manner than that chosen by NRC and to choose a method of

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4 The "three site" requirement is in Cal. Pub. Res. Code secs. 25503, 25504, 25516 (West 1977 & Supp. 1982). The "moratorium" requirement is Id. sec. 25524.2.

These are not the only provisions before the Court, in that the parties have challenged several others as well. Furthermore, the constitutionality of these two provisions is affected by the interrelationship between them and the other parts of a pervasive and onerous State regulatory scheme overlapping and duplicating the federal one. The Court of Appeals erroneously considered each in a vacuum.

5 The question of the adequacy of NRC's approach to waste disposal has been before this Supreme Court. In Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978), the Court reversed a decision adverse to NRC concerning the issue. On remand, the District of Columbia Circuit again held the rules inadequate, in an opinion rendered less than a month before this writing. Natural Resources Defense Council v. United States Nuclear Regulatory Commission, No. 74-1586 (D.C. Cir. April 27, 1982). A petition for certiorari in this most recent decision is not yet due as of this time. Such litigation represents a direct attack on NRC's approach, while California's Nuclear Laws are an "end run." It would be ironic if NRC's fuel cycle rules were upheld and if California's Nuclear Laws were permitted to stand.

Similarly, several States have attempted to enact legislation preventing nuclear waste disposal. Several such laws have been invalidated as inconsistent with the commerce clause. E.g., General Electric Co. v. Tyrone, Nos. 80-C-6835 & 81-C-461 (D. Ill. Oct. 12, 1981). Such holdings, which require States to allow disposal of out-of-State nuclear wastes, likewise provide an ironic contrast to the California Nuclear Laws.

waste disposal satisfactory to California's State Commission. [6]

REASONS FOR GRANTING THE WRIT

The supremacy clause of the Constitution was one of the principal limits on State power created by the Founders. The Constitutional Convention resulted, in large measure, because the Articles of Confederation permitted individual States to take actions contrary to the national interest. These included actions such as those of California here: laws that operated to the sole benefit of in-State residents, disadvantaged other States, and prevented coordinated solutions to common problems. Alexander Hamilton summarized this reasoning by criticizing the tendency of States to "throw off the burdens of government upon their neighbors."

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6 The California Assembly explained its reasoning thus: "Waste disposal safety is not directly addressed by the bills, which ask only that a method be chosen and accepted by the federal government." Cal. Assembly Committee on Resources, Land Use & Energy, Reassessment of Nuclear Energy in California: A Policy Analysis of Proposition 15 and Its Alternatives 156 (1976).

The California Assembly did not have authority to act for these reasons. It does not have the power under the Constitution to hold federal energy policy hostage in order to force NRC to "choose" or "accept" any particular approach. The situation with which NRC was faced was described as follows by the Court of Appeals:

> Critics of nuclear power believed that the methods . . . being considered by the federal government would be inadequate . . . . The nuclear industry, on the other hand, believed that the methods . . . would prove adequate . . . .

Slip Op. at 31-32. NRC made a decision regarding its responsibilities in light of this disagreement, concluding that those responsibilities were met by continuing the licensing process. California simply disagrees with that decision, and its Nuclear Laws are an effort to force NRC to adopt a different approach instead. The California Assembly Committee even accused NRC of "poor planning" in this regard. Cal. Assembly Committee, supra, at 18.

Policy decisions must often be made with incomplete information. Indeed, since information is never perfect, decisions based upon incomplete information are a part of the human condition. The present case concerns whether a State can prevent the national government from engaging in such policy making in a real-world context.

II ELLIOT'S DEBATES 366-67. The Federalist, which was the principal document reflecting the consensus under which the Constitution was ratified, contains repeated reference to the need for centrally administered laws to prevent regional "factions" from benefitting themselves at the expense of others. E.g., THE FEDERALIST No. 44.

California's laws, if upheld, would necessitate that each State take its place in a kind of reverse bandwagon against the development of nuclear power, including States that might consider nuclear development nationally advantageous. Laws such as California's do not decrease the demand for electricity, nor do they prevent siting of nuclear facilities in contiguous States or the interstate transmission of the electricity so generated.[7] There are finite risks associated with nuclear power as well as political liabilities for legislators who support it, but significant advantages in the form of cheap and abundant electricity would result from the location of nuclear facilities in adjacent States. Thus a sensible strategy for cynical legislators might be to oppose in-State construction and to support policies that make neighboring States a "dumping ground" for the political disadvantage of nuclear power. Unless contiguous States affirmatively follow the example of California and artificially restrict nuclear development, they will find themselves to be preferred sites for generating facilities to serve markets in States, such as California, that have cast off the burdens upon their neighbors.

In some instances, furthermore, common interests might well be served by the installation of generating capacity in one State to serve markets in other States. A nuclear facility serving Boston, for example, might be proposed in New Hampshire. A site in such a State, which may be uniquely suited in the region to serve Maine, Massachusetts and other States, might be the best

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7 The United States is covered by electric grids interconnected to prevent blackouts and administered under the provisions of the Federal Power Act. Events in one State can easily cause damage to facilities located in another, including power losses. See Appendix A (diagrammatic representation of United States electrical system interconnects).

location in terms of minimization of radiation and environmental hazards. It might be in a small corner of New Hampshire, where few of the State's population are to be found. NRC's function is to make such siting choices in the national interest. Its responsibility for radiation and environmental considerations is reflected in its published Siting Criteria.[8] If California's laws succeed, however, New Hampshire or any other similarly situated State would have a simple means of frustrating the mission of the NRC. The agency might be forced to approve an alternative site less satisfactory from the standpoint of radiation safety, solely because the alternative happened to be in a State that did not have a law patterned upon California's. But that alternative would itself be short-lived, because if California's laws succeed, each State would not be merely able to frustrate optimal siting in this manner; it would be forced by the bandwagon effect to do so to protect its own interests.

This possibility is not conjectural. More than half the States have already considered laws reciprocal to California's, and several have been enacted.[9] The variation among such laws is itself an

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8 The Reactor Site Criteria are at 10 C.F.R. pt. 100. In particular, section 100.10 lists the following considerations for siting decisions:

> (a) Characteristics of reactor design . . . .
> (b) Population density and use characteristics of the site and environs . . . .
> (c) Physical characteristics of the site, including seismology, meteorology, geology, and hydrology.

If California followed "land use" criteria for evaluating the three sites required to be submitted to it, it would necessarily consider these identical factors—but it would evaluate them inconsistently with the NRC if, as it claims, it does not intend to consider reactor safety and radiological hazards. Alternatively, if California intends to consider radiological safety in evaluating its "land use" concerns, it enters a preempted area. In either event, the three site requirement engenders inevitable conflicts with NRC's role.

9 Murphy & La Pierre, Nuclear Moratorium Legislation in the States and the Supremacy Clause: A Case of Express Preemption, 76 COLUM. L. REV. 393 (1976). The Court of Appeals cited this work, but it failed to note that the Authors' conclusion is that such legislation is "clearly" preempted.

impediment to nuclear development. Two scholars, writing in the *Columbia Law Review*, undertook a comprehensive study of such State laws and concluded as follows:

> There can be little doubt about the objective of most of the proposed state measures considered here. The supporters to not like nuclear power and seek to stop (indeed roll back) its development. They would do so at the federal level; failing that, they seek to do so at the state level. The opposition is explicity based on fear of the hazards of a nuclear power program—principally the possibility of a catastrophic reactor accident, the problem of long-term hazards of storing "wastes" produced in the fission process, and the possibility of diversion of nuclear materials, especially plutonium, by terrorist groups. All of these matters concern radiological safety and are within the area of control expressly reserved to the federal government by the Atomic Energy Act. They are the subject of extensive—some think excessive—regulation by the Nuclear Regulatory Commission, as successor to the AEC, whose special responsibility has only recently been reaffirmed.
>
> Although the proposed bills are sometimes justified as state regulation, in most cases the claim of regulation is patently a subterfuge for the real objective—prohibition. Although the bills are phrased in terms of "conditions" to be met before further construction, the conditions are, as a practical matter, incapable of fulfillment. It is generally agreed that the probability of a catastrophic accident at a nuclear power plant is very low, but it will never be zero. There is no way that one can now be sure that wastes can be stored without accident throughout eternity, and no one can develop a system which

> will certainly foil a terrorist group bent on making a bomb. Similarly, a pre-assurance of "full compensation" for an unknowable amount of potential damages is impossible.
>
> But even if the bills are viewed as regulatory they would put the states into an area exclusively regulated by the federal government (and in which the states have no expertise). At best they would be redundant; at worst they would be in conflict with federal programs. But whether redundant or conflicting, they are preempted by the Atomic Energy Act. If enacted, the bills almost certainly would be declared invalid. In the meantime, however, they would cause a great deal of confusion and delay and might result in the choice of fossil fuel plants by some companies who did not wish to take even the small risk that the acts would be upheld. The problem of delay and confusion is particularly acute in California and Oregon, where anti-nuclear power initiatives have already been placed on the 1976 ballot.

Murphy & LaPierre, supra note 9, at 455. The Nuclear Laws at issue here are a substitute for the California ballot initiative Murphy and LaPierre refer to as unconstitutional.

Perhaps the most distasteful aspect of the bandwagon effect is the duplicity that the Court of Appeals' opinion encourages. There can be no question that California's legislators responded to constituents whose concern was radiation hazards. But legislation based on that concern would be preempted, and therefore, legislators masked their motivation by pretexts. The California Assembly acted in response to a ballot initiative founded explicitly on radiation concerns. Miraculously, however, the Assembly responded by Nuclear Laws purporting completely to omit any such concerns. Since every safety concern is, in the final analysis, the obverse of an economic concern, the Assembly could readily

express a motivation that was economic—even though the "economics" are based upon radiation.[10] Furthermore, since radiation protection is closely related to siting and land-use concerns,[11] the Assembly could encompass its response to constituents' radiation concerns in those terms. The Court of Appeals was not persuaded in the matter by the insight of the District Court in one of these cases, below, which stated:

> . . . The underlying premise seems to be that any sort of regulation at all is permissible as long as a state legislature is willing and ingenious enough to conjure up a legislative purpose other than radiation control. The evil inherent in giving conclusive effect to declared state legislative purposes to uphold a state statute or regulation which would otherwise be preempted has previously been recognized by the Supreme Court. Perez v. Campbell, 402 U.S. 637, 651-52, 91 S.Ct. 1704, 1712, 29 L.Ed.2d 233 (1971). . . .
>
> More generally, the danger inherent in interpreting section 2021(k) in the manner defendants suggest is that the zone of exclusive federal regulation under section 2021(c) could readily be nullified through careful tailoring of legislative purposes. . . . It is scarcely credible that Congress, in enacting section 2021(k), intended to furnish the States with a means of evading and undermining the NRC's exclusive regulatory authority under section 2021(c).

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10 See R. POSNER, ECONOMIC ANALYSIS OF LAW ch.10 (2d ed. 1977). A targeted level of safety can be reached by application of a corresponding level of resource commitment, and in this sense every safety concern is really an "economic" one.

11 The land use concerns must inevitably conflict with NRC's siting criteria in any event. See note 8 supra and accompanying text.

472 F. Supp. at 198. These conclusions are even more serious since the bandwagon effect would penalize those States unwilling to engage in this subterfuge. Those States whose politicians debated nuclear concerns honestly and refused to misstate the reasons for their legislation would have nuclear facilities "dumped" among their populations, to serve States whose politicians were willing to dissemble.

Finally, the national concerns underlying the Atomic Energy Act and sucessor legislation[12] are underscored by the interrelationship of energy sources and energy legislation.[13] The Powerplant and Industrial Fuel Use Act ("PIFUA") and the Natural Gas Policy Act ("NGPA") reflect recognition that natural gas cannot continue indefinitely to be used cheaply as a boiler fuel. Indeed, PIFUA disallows construction of electric generating facilities fired by natural gas after 1990. As for coal, as one commentator has colorfully put it, "There are only two problems with coal: You can't dig it and you can't burn it." M. LAIRD, ENERGY—A CRISIS IN PUBLIC POLICY 8 (1977). National policy expressed in such legislation as the Clean Air Act and the Surface Mining and Reclamation Act of 1977 is the reason. These

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12 The Congressional policy underlying the Atomic Energy Act is quite clearly one of facilitating the development of nuclear energy. That purpose is so clear as to indicate, alone, the error of the holding of the Court of Appeals.

The Court of Appeals avoided this result by recognizing the purpose of energy development but explaining that Congress did not have the intent to promote it "at all costs." Such reasoning amounts to a license for States to frustrate any federal policy on any subject, because no federal policy is carried out "at all cost." Even such basic national concerns as defense, environmental protection, and the guarantee of free speech are not absolute and are not carried out at "all cost."

13 Preemption reasoning may be based upon several different enactments. See, e.g., Pennsylvania v. Nelson, infra (pre-emption found on the basis of three separate enactments with different subject matter and passed at different times). Since energy resources are closely interrelated and federal policy must and does take this interrelationship into account, the case at bar is particularly appropriate for such treatment.

energy sources are substitute goods. Maps of electric interconnects, natural gas flow, and coal transportation routes show the interstate character of their production and use. California's legislation will, quite dramatically, frustrate national policy with reference not only to nuclear generation but natural gas as well, in that it will induce California utilities to exhaust natural gas supply from their principal sources—New Mexico, Texas and Alaska—more rapidly than they would otherwise.

Preemption reasoning is enhanced by the finding not only of a national problem, but one that requires a coordinated national solution. *See, e.g., Pennsylvania v. Nelson*, 350 U.S. 497, 76 S.Ct. 477, 100 L.Ed.2d 640 (1956). In *Nelson*, the Court was faced with state Sedition Acts that supplemented parallel federal legislation on the subject of internal security. The Court concluded that the state legislation was preempted. It looked to three factors: the pervasiveness of the regulatory scheme, the dominance of the national interest, and the danger of state conflict with actual administration objectives. If these concerns are considered here, the conclusion is inescapable that Congress intended NRC to occupy the entire field of radiation-related siting decisions and that California's Nuclear Laws conflict with that intention.

CONCLUSION

The questions in this case are substantial. The bandwagon effect, the danger that it will force States to "throw off the burdens of government upon their neighbors," the encouragement of subterfuge, and the effects upon national policy regarding other energy sources, all transform the case into one affecting not just California, but all of the States in the Union. The large number of state statutes either passed or under consideration that would halt nuclear development even in the face of NRC licensing is a further indication of the importance of the case.

---

14 See Appendices infra.

15 No market is an island unto itself: when wool [prices] rise, ... it raises the [prices] of rival

Respectfully Submitted,

David Crump
Professor of Law
Law School
University of Houston
Houston, Texas 77004
(713) 749-3878
Attorney of Record for Amicus Curiae

J. Gregory Copeland
Baker & Botts
One Shell Plaza
Houston, Texas 77002

CERTIFICATE OF SERVICE

I hereby certify that I have, prior to filing this Brief, served three (3) copies each upon all counsel of record by depositing such copies in a United States Post Office, namely the Central Post Office at Houston, Texas, first class postage prepaid, addressed to: John R. McDonough, Ball, Hunt, Hart, Brown & Baerwitz, 450 N. Roxbury, Suite 500, Beverly Hills, CA 90210; William M. Chamberlain, California Energy Resources Conservation and Development Commission, 1111 Howe Ave., Sacramento, CA 95825; Ralph Cavanaugh, Natural Resources Defense Council, Inc., 25 Kearny St., San Francisco, CA 94108; and Sam Kazman, et al., Pacific Legal Foundation, 1990 M St., N.W., Suite 550, Washington, D.C. 20036; all in accordance with Rule 28.3 of the Rules of this Court.

May 20, 1982

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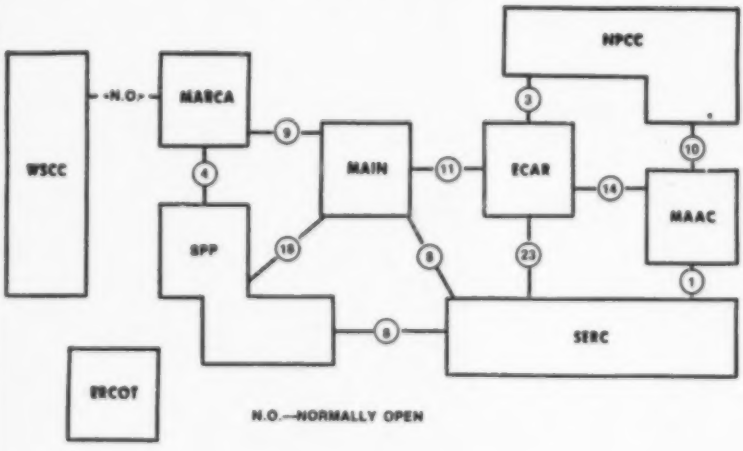
goods like cotton that some demanders will turn to . . . .
P. SAMUELSON, ECONOMICS 68 (6th ed. 1964).

Appendix

APPENDIX A
UNITED STATES INTERREGIONAL ELECTRIC INTERCONNECTIONS

This schmatic diagram shows electric regional interconnections in the United States system. The grid labelled "WSCC" includes most Western States of the nation, including California, and it is interconnected with "MARCA," the Mid-Continent Reliability Co-ordination Agreement. Interstate transmission of power is readily possible within regions. The diagram is taken from West Texas Utilities Co. v. Texas Elec. Serv. Co., 470 F. Supp. 798, 843 (N.D. Tex. 1979), which explains electrical power interconnection in detail. See also FPC v. Florida Power & Light Co., 404 U.S. 453 (1972).



PRESENT
INTERREGIONAL INTERCONNECTIONS

SOURCE: "REASONS FOR DIFFERENCES IN CRITERIA—SYSTEM DESIGN", R. M. MALISZEWSKI, PRESENTED AT IEEE POWER ENGINEERING SOCIETY 1977 WINTER MEETING

APPENDIX B
NATURAL GAS FLOW DIAGRAM

NATIONAL GAS FLOW PATTERNS, 1975

MAP 1

Summary of Gas Flow Between Major Areas

Amicus Brief for the United States

Office - Supreme Court, U.S.
FILED
MAY 22 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 81-1944 and 81-1945

In the Supreme Court of the United States

OCTOBER TERM, 1981

PACIFIC LEGAL FOUNDATION, ET AL., PETITIONERS

v.

STATE ENERGY RESOURCES CONSERVATION & DEVELOPMENT COMMISSION, ET AL.

PACIFIC GAS AND ELECTRIC COMPANY AND SOUTHERN CALIFORNIA EDISON COMPANY, PETITIONERS

v.

STATE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

JOHN H. GARVEY
Assistant to the Solicitor General

LEONARD SCHAITMAN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the provisions in the 1976 amendments to California's Warren-Alquist Act, Cal. Pub. Res. Code §§ 25524.1(b) and 25524.2 (West 1977), which condition the construction of nuclear power plants on findings by the State Energy Resources Conservation and Development Commission that there are adequate storage facilities and means of disposal available for high-level nuclear waste, are preempted by the Atomic Energy Act.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case presents a substantial question concerning the preemptive effect of the Atomic Energy Act, 42 U.S.C. 2011 *et seq.*, on state laws regulating the construction and operation of nuclear power plants. The Act gives the Nuclear Regulatory Commission (NRC) the authority to regulate such activities (42

U.S.C. 2133, 2201; see *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 63 & n.1 (1978)), and also provides a method for federal-state cooperation through agreements between the Commission and the governors of the states (42 U.S.C. 2021). When a state imposes restrictions beyond the scope of such an agreement, however, it may compromise the Commission's statutory responsibility to regulate "the construction and operation of any production or utilization facility * * *." 42 U.S.C. 2021(c)(1). The Atomic Energy Act also expresses a purpose, implemented by the Department of Energy, "to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes * * *." 42 U.S.C. 2013(d). When a state forbids the construction of nuclear power plants, while permitting the construction of other types of power plants, it frustrates this express purpose of the Act.

STATEMENT

1. The Atomic Energy Act of 1954 begins with a congressional declaration of policy: "Atomic energy is capable of application for peaceful * * * purposes. * * * [T]he development, use, and control of atomic energy shall be directed so as to make the maximum contribution to the general welfare * * *." 42 U.S.C. 2011. Its introductory sections repeat several times the intent of Congress to encourage the development of the atomic energy industry. One express purpose of the chapter is to provide for

> a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public * * *.

42 U.S.C. 2013(d). In 1957 Congress provided that the United States could limit liability and make funds available for nuclear incidents "[i]n order to protect the public and to encourage the development of the atomic energy industry * * *." 42 U.S.C. 2012(i).[1] To implement that objective Congress passed the Price-Anderson Act, and as recently as 1975 extended its coverage until 1987. 42 U.S.C. 2210. See *Duke Power Co.* v. *Carolina Environmental Study Group*, *supra*, 438 U.S. at 63-67.

Because the Act envisioned the construction of nuclear plants to produce electrical power just as utilities using other energy sources traditionally have, it left intact state authority regarding "the generation, sale, [and] transmission of electric power produced through the use of nuclear facilities," but provided that the states should not have "any authority to regulate, control, or restrict any activities of the Commission." 42 U.S.C. 2018. In 1959 the Act was amended to define more explicitly the respective authority of the Commission and the states. Section 274 of the Act, 42 U.S.C. 2021, added that year, authorized the Commission to turn over to a state responsibility for less hazardous nuclear materials pursuant to an agreement with the Governor. 42 U.S.C. 2021(b). The Commission, however, was to retain sole responsibility for such more hazardous activities as "the construction and operation of any production or utilization facility," and "the disposal of [hazardous] nuclear material * * *." 42 U.S.C. 2021(c)(1), (4). Section 274(k), 42 U.S.C. 2021(k), went on

[1] The definition of "nuclear incident" set out in 42 U.S.C. 2014(q) includes release of radiation from spent reactor fuel. Licensees storing such fuel at the reactor site are covered by the terms of the Price-Anderson Act. 42 U.S.C. 2210(a).

to state that "[n]othing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards."

2. In 1976 California amended the Warren-Alquist State Energy Resources Conservation and Development Act, Cal. Pub. Res. Code § 25000 *et seq.* (West 1977 & Cum. Supp. 1982), by adopting several provisions (the Nuclear Laws) which impose a moratorium on the construction of new nuclear plants until the State Energy Resources Conservation and Development Commission (Energy Commission) has made certain findings. Section 25524.1(b) (West 1977) provides that the Energy Commission shall determine case-by-case, before allowing construction, the adequacy of nuclear plants' spent fuel storage capacity. Section 25524.2 (West 1977) prohibits the building of any nuclear plant until the NRC "has approved and there exists a demonstrated technology or means for the disposal of high-level nuclear waste." By "disposal" is meant "permanent and terminal disposition." Section 25524.2(a), (c) (West 1977).

3. Robert Thornberry, a nuclear engineer was hired by San Diego Gas & Electric Company (SDG&E) to work on a proposed nuclear plant known as Sundesert. The project was abandoned on May 3, 1978, by resolution of SDG&E's board of directors, and Thornberry lost his job. According to the resolution, the project was abandoned both because the California legislature had not exempted Sundesert from the restrictions of §§ 25524.1 and 25524.2, and because the California Public Utilities Commission had refused to grant SDG&E a rate increase to allow financing of the project (81-1945 Pet. App. 8, 12, 14 & n.16). Thornberry then sued the Energy Commission and

its members in the United States District Court for the Southern District of California, claiming that enforcement of the Nuclear Laws had caused the loss of his job, and arguing that the laws were preempted by the Atomic Energy Act. He was joined as plaintiff by Pacific Legal Foundation and several other organizations. The district court found that only Thornberry had standing (81-1944 Pet. App. 6-7 & n.2). The court concluded that Thornberry's challenge to § 25524.1 was moot, but granted his motion for summary judgment concerning § 25524.2, holding that it was preempted by the Atomic Energy Act (81-1944 Pet. App. 5, 18). The court certified its judgment pursuant to Fed. R. Civ. P. 54(b),[2] and the Energy Commission appealed (81-1945 Pet. App. 8).

Pacific Gas and Electric Company, a utility in northern and central California, decided in the early 1970's to build a nuclear power plant (the Stanislaus project) consisting of two 1200 megawatt units. In mid-1978, after it had spent in excess of $10,000,000 on development, PG&E suspended the Stanislaus project, concluding that the Nuclear Laws and other provisions of the Warren-Alquist Act made it infeasible (81-1945 Pet. App. 72-74).

Southern California Edison (SCE), a utility in southern and central California, proposed to build for operation in the 1990's two 1000 megawatt nuclear

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[2] The district court did not dismiss the claims of the organizational plaintiffs, including Pacific Legal Foundation, but merely denied their motions for summary judgment (81-1944 Pet. App. 6). The court of appeals dismissed their cross-appeal on the ground that it was not taken from a final judgment. *Pacific Legal Foundation* v. *State Energy Resources Conservation & Development Commission*, No. 79-3424 (9th Cir. Nov. 1, 1979). See 81-1945 Pet. App. 8 n.11.

power units ("Nuclear 1" and "Nuclear 2") as a joint venture with some other utilities. Like PG&E, its management concluded that the combined effect of the Nuclear Laws and other provisions of the Warren-Alquist Act made it impractical to undertake the project (81-1945 Pet. App. 75-76).

PG&E and SCE sued in 1978 in the United States District Court for the Eastern District of California, seeking a declaratory judgment that the Nuclear Laws and 16 other sections of the Warren-Alquist Act were unconstitutional insofar as they conflicted with the Atomic Energy Act. The district court granted the utilities' motion for summary judgment on the question of preemption (see Fed. R. Civ. P. 56(d)), and after a trial limited to the issue of standing, concluded that they had standing to sue (81-1945 Pet. App. 55-64).

4. The Ninth Circuit consolidated the Energy Commission's appeals in both cases and reversed.[3] The court held that summary judgment on the issue of Thornberry's standing was improper, because he had failed to show that SDG&E's Sundesert project would be reinstituted and that he would be rehired if the Nuclear Laws were held invalid. PG&E and SCE were found to have standing (81-1945 Pet. App. 11-19), but the court held their challenge to most of the provisions in the Warren-Alquist Act not ripe (*id.* at 19-23).[4] The court also found Cal. Pub. Res.

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[3] The *Pacific Legal Foundation* case was remanded (81-1945 Pet. App. 46).

[4] The court did consider, and reject on the merits, a challenge to the requirement that utilities propose three alternative sites for construction of power plants. See Cal. Pub. Res. Code §§ 25503, 25504, 25516 (West 1977 & Cum. Supp. 1982); 81-1945 Pet. App. 41-42.

Code § 25524.1(b) (West 1977) not ripe for review, since it was unable to say whether the Energy Commission would ever find a plant's storage capacity inadequate (81-1945 Pet. App. 25).

The court did address the merits of § 25524.2—the waste disposal provision—and concluded that it was not preempted. The court found in Section 274(k) of the Atomic Energy Act, 42 U.S.C. 2021(k), a congressional declaration that states should be permitted to regulate "for purposes other than protection against radiation hazards." Since California's concern in enacting the moratorium was a financial interest—"that uncertainties in the nuclear fuel cycle make nuclear power an uneconomical and uncertain source of energy"—it was compatible with the intent of Congress (81-1945 Pet. App. 40). Moreover, it found no conflict between the moratorium imposed by § 25524.2 and the purposes of the Atomic Energy Act. Pointing to subsequent legislation which encourages the development of other energy sources, and to statutes like the Clean Air Act Amendments of 1977, 42 U.S.C. (Supp. III) 7416, 7422, which permit state regulation of some aspects of nuclear power production more strict than the corresponding federal restrictions, the court concluded that it did "not find an intent to promote nuclear power at all costs" (81-1945 Pet. App. 42).[5]

DISCUSSION

The court of appeals' decision sanctions state action which poses a serious obstacle to the develop-

[5] Judge Ferguson concurred. He would have held that the plaintiffs had no private right of action to enforce the provisions of the Atomic Energy Act (81-1945 Pet. App. 47-52). A petition for rehearing was denied on January 20, 1982 (*id.* at 53).

ment of nuclear power as a source of electricity. The California nuclear moratorium conflicts with the express terms of the Atomic Energy Act. It also restricts the development of nuclear energy to an impermissible degree, and thereby frustrates the achievement of Congress's objectives in passing the Act. The court's decision should be reversed.

1. The problem of finding a satisfactory long-term solution for the disposal of high-level radioactive waste[6] is currently receiving intense consideration by the federal government. The safety issues related to waste-disposal technology, and the impact which they should have on federal licensing of nuclear power reactors, are the subject of a rulemaking proceeding pending before the Nuclear Regulatory Commission. 44 Fed. Reg. 61372 (1979). The Department of Energy (DOE) is taking steps to develop a disposal technology, not only for spent fuel generated by nuclear power plants, but also for the large quantities of high-level radioactive materials generated by defense and related activities. See *Spent Fuel and Radioactive Waste Inventories and Projections As of December 31, 1980*, DOE NE-0017, 9-11 (Sept. 1981). Although there is no currently licensed means for permanent safe disposal of such materials, the impact on present proposals for construction of nuclear power facilities is tempered by several facts.

First, it takes approximately 12 to 14 years from the time a decision is made to build such a plant until it begins commercial operation (see 81-1945 Pet. App. 71). Second, the NRC has authority to license on-site storage of spent fuel for a period of years after the plant begins operations. See *Min-*

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[6] See *Natural Resources Defense Council, Inc.* v. *NRC*, 582 F.2d 166, 167 n.2 (2d Cir. 1978).

nesota v. *NRC*, 602 F.2d 412, 419 (D.C. Cir. 1979); *Natural Resources Defense Council, Inc.* v. *NRC*, 582 F.2d 166, 169 (2d Cir. 1978). Third, apart from on-site storage the NRC has the authority to license off-site storage of spent fuel while the technology for permanent disposal is being approved. See 10 C.F.R. Part 72. One such facility, located in Morris, Illinois, has been licensed and has a contract with petitioner Southern California Edison to store spent fuel from SCE's San Onofre, California, plant. See *Illinois* v. *General Electric Co. and Southern California Edison Co.*, appeal pending, Nos. 81-2768, 81-2778 (7th Cir.). The NRC has determined that the likelihood of developing a means for permanent disposal, coupled with the fact that "safe storage methods are * * * available and highly likely to remain so until a permanent disposal system can be demonstrated and licensed," warrant its decision to continue to license new facilities. *Natural Resources Defense Council* v. *NRC*, *supra*, 582 F.2d at 169. Its decision has been upheld by the Second Circuit. *Ibid.* See also *Minnesota* v. *NRC*, *supra*, 602 F.2d at 419.

The pressure to resolve quickly the long-term disposal problem, or to cease altogether the development of nuclear power as a source of electrical energy, has been aggravated by statutory initiatives in numerous states. Many have approached the issue from what is called the "back end" of the fuel cycle, by forbidding the transportation or storage of spent fuel and other high-level wastes within their borders.[7]

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[7] See, *e.g.*, Ill. Rev. Stat. ch. 111½, § 230.22 (Cum. Supp. 1981); Washington Initiative Measure No. 383, 1981 Wash. Laws 1995. The Illinois Spent Fuel Act was declared unconstitutional in *General Electric Co.* v. *Fahner*, Nos. 80 C 6835, 81 C 461 (N.D. Ill. Oct. 12, 1981), appeal pending, Nos. 81-2768, 81-2778 (7th Cir.). The Washington Initiative was

Cal. Pub. Res. Code §§ 25524.1(b) and 25524.2 (West 1977), by contrast, affect the "middle" of the cycle, forbidding the construction of new nuclear power plants until the issues of high-level waste storage and disposal are resolved. Although California asserts that its action was motivated by economic considerations rather than by concern for the radiological hazards posed by high-level waste (81-1945 Pet. App. 40), it is clear that approving that approach will offer to other states the option of banning the development of nuclear energy by "simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective * * *." *Perez* v. *Campbell*, 402 U.S. 637, 652 (1971). Since passage of the California nuclear moratorium in 1976 several states have already availed themselves of that option. Conn. Gen. Stat. Ann. § 22a-136 (West Cum. Supp. 1982); Me. Rev. Stat. Ann. tit. 10, §§ 251-256 (West 1980); 1982 Me. Acts, ch. 643 (to be codified at Me. Rev. Stat. Ann. tit. 10, § 166); Md. Ann. Code art. 78, § 54A (Supp. 1981); Or. Rev. Stat. § 469.595 (1981); see also Mass. H. Res. No. 5888 (1979). The possibility that similar action will be taken elsewhere during the extended period required for approval and construction of a nuclear facility adds an element of risk which could make the necessary monetary investment too speculative to undertake.

2. Cal. Pub. Res. Code §§ 25524.1(b) and 25524.2 (West 1977) conflict with the explicit terms of the Atomic Energy Act and the implementing regulations passed by the NRC. They are thus invalid under the Supremacy Clause. U.S. Const., art. VI,

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declared unconsitutional in *Washington State Building & Construction* v. *Spellman*, 518 F. Supp. 928 (E.D. Wash. 1981), appeal pending, Nos. 81-3454, 81-3461 (9th Cir.).

cl. 2. Section 274(c) of the Atomic Energy Act, 42 U.S.C. 2021(c), provides that regardless of any cooperative agreement entered into between the NRC and the governor of a state,

> * * * the Commission shall retain authority and responsibility with respect to regulation of—
>
> (1) the construction and operation of any production or utilization facility;
>
> * * * * *
>
> (4) the disposal of such * * * nuclear material as the Commission determines * * * should, because of the hazards or potential hazards thereof, not be so disposed of without a license from the Commission.

Implementing that provision, the NRC currently requires that nuclear power plants store spent fuel either on the site of a plant or in a licensed independent spent fuel storage installation meeting specified siting and design criteria. 10 C.F.R. Part 72. Because no permanent disposal facility has yet been licensed, any attempt to dispose of high-level waste by other means is prohibited. 10 C.F.R. 72.6.

California, by contrast, has made two different demands. It requires the Energy Commission to "find on a case-by-case basis that facilities with adequate capacity * * * to store [spent] fuel * * * are in actual operation or will be in operation at the time such nuclear facility requires such * * * storage; provided, however, that such storage of fuel is in an offsite location to the extent necessary to provide continuous onsite full core reserve storage capacity." Cal. Pub. Res. Code § 25524.1(b) (West 1977). In addition it demands, before any nuclear plant can be built, that the Energy Commission find that "there exists a [federally approved] demonstrated technology or means for the disposal of high-

level nuclear waste." *Id.* at § 25524.2(a). By "disposal" is meant "a method for the permanent and terminal disposition of high-level nuclear waste." *Id.* at § 25524.2(c). Moreover, the acceptability of such a method must be demonstrated by "*in situ* large scale tests" (81-1945 Pet. App. 70).

This attempt to improve upon the current federal scheme for storage and disposal of spent fuel is preempted by the federal statutory and regulatory system.[8] "Congress intended uniform national standards for design and construction" of nuclear power plants, and for techniques for disposal of spent fuel, "that would foreclose the imposition of different or more stringent state requirements." *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 163 (1978); *Northern States Power Co.* v. *Minnesota*, 447 F.2d 1143, 1153 (8th Cir. 1971), aff'd mem., 405 U.S. 1035 (1972).[9] The history of the enactment of Section 274, 42 U.S.C. 2021, makes clear that state regulation concerning

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[8] The court of appeals erred in concluding that § 25524.1(b) was not ripe for review (81-1945 Pet. App. 25). The authority of a state to demand more or different storage facilities than the NRC does is a purely legal question. Moreover, the threat of eventual rejection by the state which overhangs utility construction proposals has a very real present effect on decisions to invest in nuclear power plants. *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407, 417-423 (1942).

[9] It does not excuse the California regulatory scheme to say that the disposal technology demanded must be acceptable to the federal government. Washington might easily have excluded oil tankers from Puget Sound by declaring that they would be admitted when the federal government approved "standard safety features" like those required by the state. Cf. *Ray* v. *Atlantic Richfield Co.*, *supra*, 435 U.S. at 160. It does not harmonize state and federal law to say that the federal government is free to adopt requirements deemed desirable by the state.

the control of radiation hazards from nuclear materials was to be permitted only pursuant to the agreements authorized by Section 274(b), 42 U.S.C. 2021(b). Though an explicit statement to that effect was deleted from the proposed text of Section 274(k), 42 U.S.C. 2021(k), the change was explained to the Joint Committee on Atomic Energy thus:

> Mr. Ramey: Is it not the Commission position, that without the lead-off language of subsection k, the same result is legally intended and legally effective?
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> Mr. Lowenstein: Yes.
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> * * * * *
>
> Chairman Anderson: You have preempted the field, have you not?
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> Mr. Lowenstein: Yes, sir.

Hearings Before the Joint Comm. on Atomic Energy on Federal-State Relationships in the Atomic Energy Field, 86th Cong., 1st Sess. 492-493 (1959) ("*Hearings*").

California has attempted to justify its regulation by pointing to the statement in Section 274(k), 42 U.S.C. 2021(k), that "[n]othing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards." Its concern, it argues, is not that the health of its citizens might be harmed by exposure to high-level waste, but that new reactors might have to be shut down in order to prevent such harm if storage space is not available and techniques for permanent disposal are not licensed. Because that alternative would cause economic harm to consumers of electricity, California asserts that the "purpose" of its moratorium is financial, not health and safety, and that it may

therefore forbid or restrict the construction of new nuclear power plants until it is satisfied with their storage and disposal technology.

That contention, however, is difficult to square with the Act's direction that the NRC "shall retain authority and responsibility with respect to regulation of * * * the construction and operation of [nuclear power plants and] * * * the disposal of [hazardous] nuclear material * * *." 42 U.S.C. 2021(c). Acting pursuant to that provision, the NRC has decided to continue, at least for the present, the licensing of new reactor facilities, based on its judgment that present storage techniques, coupled with progress toward a means of long-term disposal, are adequate to assure that we will not be subjected to radiation hazards from high-level wastes. The reservation of authority to the states to regulate for other purposes was not intended to allow them to review that judgment. Cal. Pub. Res. Code §§ 25524.1(b) and 25524.2 (West 1977) are without question attempts to regulate directly the acceptable methods of managing the radiation hazards of nuclear waste. For putatively economic motives, those provisions require in effect that radiation hazards be dealt with by disposal techniques or by storage guaranteed to the satisfaction of the state Energy Commission, and not by the storage scheme presently authorized by the NRC.

No such concurrent regulatory authority was envisaged by Congress. The reservation on behalf of the states was designed to provide some latitude for states to exercise their traditional police powers when the subject matter was not radiation hazards.

> [W]e did not intend to leave any room for the exercise of concurrent jurisdiction by the States

> to control radiation hazards from those materials. Our sole purpose was to leave room for [state laws] dealing with matters on the fringe of the preempted area in the light of all the provisions and purposes of the Atomic Energy Act * * *.

Hearings, *supra*, at 500. For example, the states would be permitted to fix rates for power generated at nuclear facilities, or to impose land use requirements, even though both would affect construction of nuclear power plants and disposal of spent fuel. The difference between California's moratorium and such laws is that the latter do not proceed from a judgment that conflicts with a determination already made by the NRC about the likelihood and prevention of radiation hazards.[10] Cf. *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 14-18 (1976).

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[10] A comparison with *Ray* v. *Atlantic Richfield Co.*, *supra*, is instructive. Washington's Tanker Law required oil tankers of from 40,000 to 125,000 DWT to have certain safety features in order to insure vessel safety and environmental harm from oil spillage. The Court held that it was preempted by the federal Ports and Waterways Safety Act of 1972, 33 U.S.C. 1221 *et seq.*, which was enacted for the same purposes. 435 U.S. at 160-168. It is difficult to imagine that the result would have been different if Washington had argued that its purpose was not to prevent the environmental harm from an oil spill, but to protect the commercial interests of waterfront merchants who could suffer a loss of trade in the event of such an accident.

Nothing in *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440 (1960), dictates a contrary conclusion. In that case the city did not, in passing its Smoke Abatement Code, act from an assumption which conflicted with the Coast Guard's determination that ships equipped with Scotch marine boilers were safe for navigation. *Id.* at 445. Nor, of course, did the federal government have an interest in promoting the use of such boilers.

3. It is unquestionable that a major purpose of the Atomic Energy Act was to encourage the development and utilization of nuclear energy for peaceful purposes. 42 U.S.C. 2011, 2012(i), 2013(d). A similar objective underlies more recent legislation, such as the Price-Anderson Act, 42 U.S.C. 2210. See *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 63-67 (1978). The dependence on nuclear power, among other energy sources, is reenforced in the Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. (Supp. III) 8301 *et seq.*, which precludes reliance on natural gas and petroleum as primary energy sources in new power plants. 42 U.S.C. (Supp. III) 8311; see also 42 U.S.C. (Supp. III) 8301(b)(3), 8312(a). Cal. Pub. Res. Code § 25524.2 (West 1977) "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting such legislation. *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

The court of appeals was correct in stating that Congress has not shown "an intent to promote nuclear power at all costs" (81-1945 Pet. App. 42). It erred in concluding from that premise that Congress's purpose to encourage private development of nuclear power was defeasible by any state law which claimed to pursue ends other than protection against radiological hazards.[11] Section 274(k), 42 U.S.C.

[11] Other federal statutes upon which the court relied actually undercut, rather than support, its conclusion. Although states may enact air emission standards which impose additional costs on utilities employing nuclear power, they may do so because Congress has explicitly granted such authority in the Clean Air Act Amendments of 1977, 42 U.S.C. (Supp. III) 7416, 7422. The same may be said of state authority to enact siting and land use requirements which affect nuclear

2021(k), upon which the court placed great reliance, is not an affirmative grant of power to the states to impede the developmental purposes of the Atomic Energy Act. Its function is "to leave room for [state laws] * * * dealing with matters on the fringe of the preempted area *in the light of all the provisions and purposes of the Atomic Energy Act* * * *." *Hearings, supra*, at 500 (emphasis supplied). Even if the states were to be permitted to review the judgment of the federal agencies charged with developing long-term disposal technologies, they would not be free to jeopardize the primary purposes of the Act by erecting statutory barriers higher than necessary to protect their purported concerns. California has done precisely that.

California has claimed that it is concerned about the possibility that new nuclear power plants may have to be shut down because of a "clog" in the nuclear fuel cycle—the inability to dispose of spent fuel (81-1945 Pet. App. 38). That concern, however, would be completely satisfied by an assurance that storage for high-level waste will be available throughout the useful life of the plant—a period of approximately 40 years. See 10 C.F.R. 50.51. Were the NRC to require on-site storage sufficient to accommodate that amount of waste, the state's concern about a "clog" on the fuel cycle would be at an end. Quite apart from the NRC's oversight of the problem, California has attempted to provide itself that same as-

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plants, a power explicitly recognized in the NRC Authorization Act for Fiscal Year 1980, Pub. L. No. 96-295, 94 Stat. 780, 783. By contrast, the authority to review a judgment by the NRC concerning the likelihood and consequences of an inability to dispose of hazardous nuclear material is not only unrecognized by Congress, but explicitly withdrawn from the states by 42 U.S.C. 2021(c).

surance in Cal. Pub. Res. Code § 25524.1(b) (West 1977), which requires the state Energy Commission to "find on a case-by-case basis that facilities with adequate capacity * * * to store [spent] fuel * * * are in actual operation or will be in operation at the time such nuclear facility requires such * * * storage * * *." The state has articulated no financial justification for going further and demanding federal approval of "a method for the permanent and terminal disposition of high-level nuclear waste." § 25524.2(c). The responsibility for balancing that concern with the larger purposes of the Atomic Energy Act has been left with the NRC and DOE, which "under our constitutional Government must pass upon these issues on behalf of the people of [California] as well as on behalf of all others." *First Iowa Cooperative* v. *FPC*, 328 U.S. 152, 182 (1946); see Murphy & LaPierre, *Nuclear "Moratorium" Legislation in the States and the Supremacy Clause: A Case of Express Preemption*, 76 Colum. L. Rev. 392, 447-450 (1976).

That Cal. Pub. Res. Code § 25524.2 fulfills no financial imperative for California may be discerned from the circumstances of its enactment. The 1976 Nuclear Laws were passed as an alternative to Proposition 15, an initiative submitted to the voters in June of 1976.[12] Like § 25524.2, Proposition 15 barred construction of new nuclear power plants unless a permanent method of waste disposal was developed, though Proposition 15 gave as the reason for its concern the threat of harm to "the land or the people of * * * California" (81-1944 Pet. App. 23). Other provisions in the Nuclear Laws are less guarded in their

[12] By their terms the Nuclear Laws would not have become operative if Proposition 15 had been adopted. Cal. Pub. Res. Code § 25524.2, Historical Note (West 1977).

statement of reasons for the moratorium. Section 25524.3(b) (West Cum. Supp. 1982), for example, required the state Energy Commission to undertake a study of undergrounding and berm containment of nuclear reactors, to determine whether such construction techniques were necessary for "enhancing the public health and safety at a site and related facility * * *." That the state's financial concerns were not sufficiently serious to guarantee passage of the Nuclear Laws is made clear by the Committee Report published shortly before the initiative was defeated. The report stated: "[I]f the Initiative fails and the bills have not passed, the impetus which makes the bills attractive would fade. As a result, the bills would probably never be enacted either." Assembly Committee on Resources, Land Use and Energy, *Reassessment of Nuclear Energy in California: A Policy Analysis of Proposition 15 and Its Alternatives* 157 (May 10, 1976).[13]

Cal. Pub. Res. Code § 25524.2 (West 1977) conflicts with the express terms and the purposes of the Atomic Energy Act. The court of appeals' decision sustaining it, if not reversed, will afford significant encouragement to nascent state efforts to eliminate nuclear power as an alternative energy source.[14]

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[13] Both the California Attorney General and the California Legislative Counsel have concluded that the 1976 Nuclear Laws are unconstitutional. 61 Op. Cal. Att'y Gen. 159, 173 & n.39 (1978).

[14] On April 29, 1982, the Senate passed a bill, S. 1662, 97th Cong., 2d Sess., entitled the National Nuclear Waste Policy Act of 1982. Section 204 of the bill (*reprinted in* 128 Cong. Rec. S4325, S4326 (daily ed. Apr. 29, 1982)) provides that "[t]he enactment of this Act shall be construed in any Federal, State, and local administrative or judicial proceeding to satisfy any legal or statutory requirement (1) for the exist-

CONCLUSION

The petitions for a writ of certiorari should be granted, limited to the Question Presented in this brief.[15]

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

JOHN H. GARVEY
Assistant to the Solicitor General

LEONARD SCHAITMAN
Attorney

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ence of and the approval of the United States of a demonstrated technology or means for the disposal of spent fuel and high-level nuclear waste and (2) for assurance of the safe disposal of spent fuel and high-level nuclear waste and the scheduled availability of storage and disposal facilities for high-level nuclear waste." The bill has been referred to committee in the House. If it or something similar should be enacted, it would be appropriate for this Court to consider vacating the court of appeals' decision and remanding for reconsideration in light of the legislation. We will of course inform the Court of any such developments which may bear on the proper disposition of this case.

[15] Essentially for the reasons stated by the court of appeals, we believe that the other questions presented by the petitioners are not appropriate for review by this Court.

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